No. 17-204	
Title:	Apple Inc., Petitioner v. Robert Pepper, et al.
Docketed:	August 7, 2017
Linked with 18A399	
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Numbers:	(14-15000)
Decision Date:	January 12, 2017
Rehearing Denied:	May 4, 2017
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Aug 02 2017	Petition for a writ of certiorari filed. (Response due September 6, 2017)
Sep 06 2017	Motion for leave to file amicus brief filed by Washington Legal Foundation.
Sep 06 2017	Brief of respondents Robert Pepper, et al. in opposition filed.
Sep 06 2017	Motion for leave to file amicus brief filed by ACT The App Association.
Sep 15 2017	Objection to motions of the App Association and the Washington Legal Foundation to fie briefs in support of petitioner from respondents Robert Pepper, et al. filed.
Sep 20 2017	DISTRIBUTED for Conference of 10/6/2017.
Sep 20 2017	Reply of petitioner Apple Inc. filed. (Distributed)
Oct 10 2017	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
May 08 2018	Brief amicus curiae of United States filed. Proof of Service Main Document

May 22 2018	DISTRIBUTED for Conference of 6/7/2018.
Jun 11 2018	DISTRIBUTED for Conference of 6/14/2018.
Jun 18 2018	Motion for leave to file amicus brief filed by ACT The App Association GRANTED.
Jun 18 2018	Motion for leave to file amicus brief filed by Washington Legal Foundation GRANTED.
Jun 18 2018	Petition GRANTED.
Jun 25 2018	Motion for an extension of time to file the briefs on the merits filed. **Main Document**
Jul 03 2018	Motion to extend the time to file the briefs on the merits granted. The time to file the joint appendix and petitioner's brief on the merits is extended to and including August 10, 2018. The time to file respondents' brief on the merits is extended to and including September 24, 2018.
Aug 07 2018	Blanket Consent filed by Respondent, Robert Pepper, et al. **Blanket Consent** **Proof of Service**
Aug 10 2018	Brief of petitioner Apple Inc. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Aug 10 2018	Joint appendix filed. (Statement of costs received.) **Main Document** **Proof of Service**
Aug 16 2018	Brief amicus curiae of R Street Institute filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Aug 17 2018	Brief amicus curiae of Washington Legal Foundation filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Aug 17 2018	Brief amicus curiae of Computer & Communications Industry Association filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Aug 17 2018	Brief amicus curiae of Chamber of Commerce of the United States of America filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Aug 17 2018	Brief amicus curiae of ACT The App Association filed. **Proof of Service** **Certificate of Word Count** **Main Document**

Aug 17 2018	Brief amicus curiae of United States filed. **Proof of Service** **Main Document**
Aug 17 2018	Brief amicus curiae of BSA | The Software Alliance filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Aug 17 2018	Brief amicus curiae of Verizon Communications Inc. in support of neither party filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Sep 10 2018	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. **Proof of Service** **Main Document**
Sep 24 2018	Brief of respondents Robert Pepper, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 28 2018	Blanket Consent filed by Petitioner, Apple Inc.. **Blanket Consent**
Oct 01 2018	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Oct 01 2018	Brief amicus curiae of American Antitrust Institute filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Oct 01 2018	Brief amici curiae of Texas, Iowa, and 29 Other States filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Oct 01 2018	Brief amici curiae of Antitrust Scholars filed. **Certificate of Word Count** **Main Document** **Proof of Service**
Oct 01 2018	Brief amicus curiae of Open Markets Institute filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Oct 09 2018	SET FOR ARGUMENT ON Monday, November 26, 2018
Oct 11 2018	Application (18A399) to extend the time to file a reply brief from October 24, 2018 to October 29, 2018, submitted to The Chief Justice. **Main Document** **Proof of Service**
Oct 15 2018	Record requested from the U.S.C.A. 9th Circuit.
Oct 17 2018	Application (18A399) granted by The Chief Justice extending the time to file petitioner's reply brief on the merits to and including October 29, 2018.

Oct 19 2018	CIRCULATED
Oct 29 2018	Reply of petitioner Apple Inc. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 26 2018	Argued. For petitioner: Daniel M. Wall, San Francisco, Cal.; and Noel J. Francisco, Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae). For respondents: David C. Frederick, Washington, D. C.

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RECORD
AND
BRIEFS.

17-204

No. 17-___

In the Supreme Court of the United States

IN RE APPLE IPHONE ANTITRUST LITIGATION,

APPLE INC.,

Petitioner,

v.

ROBERT PEPPER, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) and its progeny hold that the damages remedy in antitrust disputes belongs only to the immediate victims of the anticompetitive conduct ("direct purchasers"), and not to downstream parties claiming "pass-through" damages ("indirect purchasers"). Electronic marketplaces such as Apple's App Store present a new wrinkle on this doctrine, because the marketplace sponsor (*e.g.*, Apple) interacts with and delivers goods "directly" to consumers, but as an agent on behalf of third party sellers.

The district court dismissed this action under *Illinois Brick*, holding that consumer plaintiffs alleging monopolization of distribution services Apple provides to app developers were necessarily seeking pass-through damages. The Ninth Circuit reversed, holding—in an acknowledged split with the Eighth Circuit—that consumers can sue whoever delivers goods to them, even if they seek pass-through damages.

The question presented is:

> Whether consumers may sue for antitrust damages anyone who delivers goods to them, even where they seek damages based on prices set by third parties who would be the immediate victims of the alleged offense.

LIST OF PARTIES AND RULE 29.6 STATEMENT

Petitioner Apple Inc. is a nongovernmental corporate party with no parent corporation, and no publicly-held corporation owns 10% or more of its stock.

Respondents are consumer plaintiffs Robert Pepper, Stephen H. Schwartz, Edward W. Hayter, and Eric Terrell, all of whom purchased an iPhone and purchased an iPhone software application during the alleged class period. Respondents purport to represent a class of similarly situated persons in the United States who purchased an iPhone software application from December 29, 2007 to the present.

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OPINION BELOW

The decision below is reported at 846 F.3d 313 (9th Cir. 2017) Pet. App. 1a-22a. The order denying rehearing *en banc* is unpublished. *Id.* at 38a-39a. The district court's decision dismissing the second amended consolidated class action complaint is unpublished. *Id.* at 23a-37a.

JURISDICTION

The court below entered judgment on January 12, 2017 (Pet. App. 1a), and denied a timely rehearing petition on May 4, 2017 (*id.* at 39a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2 of the Sherman Act, 15 U.S.C. § 2, makes it unlawful for any "person . . . [to] monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations."

Section 4 of the Clayton Act, 15 U.S.C. § 15(a), provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

INTRODUCTION

This case is about petitioner Apple Inc.'s "App Store," an electronic marketplace through which third-party software developers can sell software applications (called "apps") for the iPhone directly to consumers, in exchange for certain commissions paid to Apple. A putative class of consumers claims that Apple illegally monopolized the distribution of iPhone apps, and that the commissions charged to app developers inflate the prices consumers ultimately pay for apps. The threshold issue is who may seek damages based on allegedly anticompetitive conduct by Apple that allows it to charge excessive commissions on apps distribution: the app developers, the plaintiff consumers, or both?

This is a critical question for antitrust law in the era of electronic commerce. The leading case addressing this issue was *Campos v. Ticketmaster Corp.*, 140 F.3d 1166 (8th Cir. 1998), *cert. denied*, 525 U.S. 1102 (1999), which held almost two decades ago that consumers could not seek damages based on alleged monopolization of ticketing distribution services, even if this resulted in higher ticketing service fees that consumers paid directly to Ticketmaster. The Eighth Circuit correctly recognized that under this Court's decisions in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), and its predecessor, *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), any damages claim belonged to the concert venues that were the direct victims of the alleged monopolization by Ticketmaster, not to consumers who had patronized Ticketmaster's electronic marketplace. In an invitation brief filed with this Court, the United States agreed

that consumer damages claims were barred by *Illinois Brick*.[1]

The Ninth Circuit has now thrown that settled law into disarray, in an opinion that expressly sides with the *dissent* in the *Campos* case and declares that consumers can always sue whichever party performs the marketplace "function" of a "distributor" and *delivers* goods to them. Since Apple delivers apps (electronically) to consumers, the Ninth Circuit held that consumers can sue Apple—regardless of whether Apple has actually sold anything of its own to consumers, and regardless of whether the consumers are complaining about a charge imposed not on them in the first instance, but (as is undisputed) on third-party developers instead.

The Ninth Circuit's brand-new "distributor function" rule is the ultimate elevation of form over substance, and boldly indifferent to this Court's precedent and underlying objectives. In *Illinois Brick* and *Hanover Shoe* this Court recognized that because alleged overcharges often get "passed through" a distribution chain in highly uncertain ways, attempts to determine who actually bears the burden of the overcharge and in what proportion would greatly increase the cost, and decrease the effectiveness, of antitrust litigation. The Court chose to eliminate that problem by permitting one set of plaintiffs—the first parties to bear an alleged overcharge—to recover the *entire* overcharge, and disallowing virtually all

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[1] *See* Brief for the United States and the Federal Trade Commission as Amicus Curiae, *Campos v. Ticketmaster Corp.*, 525 U.S. 1102 (1999) (No. 98-127), https://www.justice.gov/sites/default/files/osg/briefs/1998/01/01/98-0127.ami.pet.inv.pdf ("*Campos* U.S. & FTC Br.").

damages suits by indirect victims. The guiding principles of the *Illinois Brick* doctrine are thus (a) avoiding the "famously difficult" determination of "[p]recisely what part of the overcharge will be borne by the direct purchaser, and what [portion of the overcharge] will be borne by the indirect purchaser," *Campos*, 140 F.3d at 1170, and (b) eliminating the threat of double recovery that would be posed if both direct and indirect purchasers could sue, *see Illinois Brick*, 431 U.S. at 730-31.

Yet identifying and avoiding pass-through dynamics plays no role in the Ninth Circuit's "distributor function" rule, and the Ninth Circuit expressly declared that it "makes no difference" whether developers can sue Apple to recover damages based on exactly the same commissions. Instead, the Ninth Circuit makes dispositive the delivery of goods—a concept that other circuits find irrelevant because it "does not affect the economic substance of the transaction." *See Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc.*, 424 F.3d 363, 373 (3d Cir. 2005) *cert. denied*, 547 U.S. 1163 (2006). Effectively, the Ninth Circuit has embraced Justice Brennan's dissent in *Illinois Brick*, prioritizing the availability of a consumer damages remedy over all other considerations, including this Court's express mandate to avoid duplicative remedies.

This acknowledged circuit conflict implicates questions of exceptional national importance because of the explosive growth of electronic commerce. The Ninth Circuit has approached this case as if all commerce fits the traditional resale distribution model, where the party who delivers goods is also the party who sets the price the consumer pays. But

increasingly this is a world of electronic commerce based on electronic marketplaces that—like Apple's App Store—are structured around an agency or consignment sales model where the marketplace sponsor has nothing to do with the pricing of the goods it sells. StubHub, eBay, Google's Play marketplace, Amazon's "Amazon Marketplace" business, and Facebook's "Marketplace" are prominent examples of agency-based electronic marketplaces. The U.S. Census Bureau estimates that in 2016, e-commerce accounted for $389.9 billion in retail sales, and that number is steadily growing. *See* U.S. Dep't of Commerce, U.S. Census Bureau News, *Quarterly Retail E-Commerce Sales: 1st Quarter 2017* at 2 (May 16, 2017), https://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf. As a result, the Ninth Circuit's decision "is not some narrow ruling that will not extend far beyond the specific facts presented. The scope of the Ninth Circuit's decision has the potential to be vast." Anthony W. Swisher & Jody Boudreault, *Will Antitrust Class Action Involving Digital Store Dismantle 'Illinois Brick' Rule on Indirect Purchasers?*, The WLF Legal Pulse (Feb. 7, 2017), https://wlflegalpulse.com/2017/02/07/will-antitrust-class-action-involving-digital-store-dismantle-illinois-brick-rule-on-indirect-purchasers/.

The Ninth Circuit's "distributor function" test is blind to the economics of agency-based e-commerce marketplaces, and at odds with this Court's *Illinois Brick* doctrine. Certiorari is necessary to restore uniformity among the circuits, to make clear that the actual decisions of this Court are and remain the law, and to relieve the electronic commerce sector from a dangerous decision.

STATEMENT OF THE CASE

A. iPhone, Apps, and the App Store

In June 2007, Apple introduced the iPhone, the company's first cellular telephone product. Pet. App. 41a (¶ 2). The iPhone was a "novel," "revolutionary," and "breakthrough" product that "shifted the paradigm for smartphones, and . . . changed the entire cell phone manufacturing industry." *Id.* at 42a, 41a, 48a (¶¶ 7, 2, 26).

One of Apple's most substantial innovations associated with the iPhone involved add-on software applications, apps. Apple designed—from the ground up—an ecosystem for the use, development, sale, and distribution of apps. That ecosystem began with the initial design decision for the iPhone operating system, iOS, which will only download software applications obtained through the App Store, all of which have been vetted and approved by Apple. *Id.* at 49a (¶¶ 30-31).

The apps themselves, however, are made by thousands of registered iOS app developers who participate in the multi-billion dollar "apps economy." In March 2008, Apple released a software development kit ("SDK") for third-party developers to create approved apps for the iPhone. *Id.* at 41a, 51a-52a (¶¶ 2, 38-40). In July 2008, Apple launched the App Store, the electronic marketplace for developers to offer and distribute iOS apps to customers around the world. *Id.* at 51a (¶ 39). Apple structured the App Store around an agency sales model: developers set the price (if any) for an app, and Apple acts as the sales and delivery agent. Apple provides a variety of services to developers, including reviewing apps for safety and compatibility, hosting the App Store, and collecting the purchase price (if any) from consumers on the

developer's behalf. Apple charges the developer a 30% commission on consumer apps purchases. *Id.* at 52a (¶ 41).[2]

Apple's innovations regarding the iPhone, iOS operating system and App Store created a dynamic new industry where none had existed before. Respondents acknowledge that as of 2012, just four years into its existence, the App Store "offer[ed] more than 850,000 apps" for consumers. *Id.* at 43a (¶ 9). That number is far greater today. Apple has publicly announced that as of January 2017, the App Store offered 2.2 million apps, with iOS app developers earning over $20 billion in 2016 alone.[3]

Respondents nevertheless claim that Apple has restricted competition in iPhone apps. The operative complaint alleges two claims under § 2 of the Sherman Act, for monopolization and attempted monopolization of a supposed "aftermarket" limited to distribution services for iPhone apps. *Id.* at 60a-62a (¶¶ 70-80). It principally contends that Apple violated the antitrust laws by adopting a "closed" ecosystem for iPhone apps, which allows Apple to charge an excessive 30% commission. *Id.* at 41a-43a, 45a, 51a-52a, 54a-55a (¶¶ 4, 6-8, 14, 40-41, 48, 50).

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[2] iOS developers are also required to pay Apple an annual $99 subscription fee. Pet. App. 51a (¶ 38). Furthermore, in recent years Apple's commissions have come primarily from "in-app purchases" (IAPs) rather than the initial sale of the app. IAPs are typically extra content for the native app that the developer offers to users, either by subscription or *a la carte*.

[3] *See* Press Release, *App Store shatters records on New Year's Day* (Jan. 5, 2017), https://www.apple.com/newsroom/2017/01/app-store-shatters-records-on-new-years-day/.

B. District Court Proceedings

As the Ninth Circuit notes, the procedural history of this case is complex. It originated as the second of three putative class actions filed by the same counsel alleging that Apple's introduction of the iPhone violated antitrust laws in multiple ways. Numerous twists and turns later, this case focuses exclusively on Respondents' allegations about the App Store.

Apple moved to dismiss the complaint under *Illinois Brick*, arguing that Respondents had not alleged, and could not allege, anything other than a pass-through injury. While that is in fact undeniable, earlier versions of Respondents' complaint had been studiously vague about whether Apple adds a 30% charge *on top* of the app price set by the developer, or instead (as is true) Apple charges a 30% commission *to the developer*, based on the price that the developer sets and the consumer pays. The district court thus pressed Respondents to clarify those allegations. The final, operative complaint alleges that (i) "Apple always conditioned its 'approval' of such apps on the third party's agreement to give Apple a share of third party's sales proceeds," (ii) "the full purchase price[] includ[es] Apple's 30% commission," which is paid directly to Apple, and (iii) "Apple takes its 30% commission off the top and then remits the balance, or 70% of the purchase price, to the developer." Pet. App. 49a-50a, 52a (¶¶ 32, 41).

The district court found that "the [complaint] is fairly read to complain about a fee created by agreement and borne by the developers to pay Apple 30% from their own proceeds—an amount which is passed-on to the consumers as part of their purchase price." *Id.* at 36a. The court correctly recognized that

therefore the harm alleged by Respondents "is an indirect effect resulting from the software developers' own costs," *id.* at 37a, and dismissed the complaint for lack of antitrust standing under *Illinois Brick*.

C. The Ninth Circuit's Decision

The Ninth Circuit reversed. Pet. App. 22a.[4]

The Ninth Circuit's decision contains no discussion of whether Respondents' damages claim presents pass-through issues—the *sine qua non* of any *Illinois Brick* analysis. Instead, the panel reasoned that "[t]he key to the analysis is the function Apple serves rather than the manner in which it receives compensation for performing that function." *Id.* at 20a-21a. The panel held that there is a "fundamental distinction between a manufacturer or producer, on the one hand, and a distributor on the other," that the "distributor" is the party "who 'supplies the product directly to' plaintiffs," and that consumers always have standing to sue a "distributor," no matter what. *Id.* at 19a-21a (citation omitted). Under this "bright line," approach, the panel reasoned that because Apple delivers apps to the consumer, it acts as a "distributor," and therefore consumers are direct purchasers of apps from Apple. *Id.* at 21a.

The Ninth Circuit explained in some detail what, in its view, *did not* matter. The fact that "Apple does not

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[4] Preliminarily, the Ninth Circuit affirmed the district court's decision that it had discretion to consider Apple's renewed *Illinois Brick* motion. Respondents had argued that the motion was improper under Federal Rule of Civil Procedure 12(g) because Apple had not raised *Illinois Brick* in prior Rule 12 motions. The district court held that Respondents' position would serve only to delay the litigation and multiply costs, in violation of the principles stated in Federal Rule of Civil Procedure 1.

take ownership of the apps and then sell them to buyers after adding a markup" was unimportant because "the distinction between a markup and a [sales] commission is immaterial. . . . The key to the analysis is the function Apple serves rather than the manner in which it receives compensation for performing that function." *Id.* at 20a-21a.

In a similar vein, the Ninth Circuit emphasized that it "d[id] [not] rest [its] analysis on who determines the ultimate price paid by the buyer of an iPhone app." *Id.* at 21a. Indeed, the Ninth Circuit's indifference to that issue led it to be careless about the record evidence regarding how apps prices are set. It stated correctly that "the price is determined as a practical matter by the app developer," but incorrectly that "Apple's thirty percent commission is added automatically" to the price set by the developer. *Id.* Although diametrically opposed, *either* fact would suffice for the Ninth Circuit's analysis because the "distributor function" rule does not care how prices are set.

The Ninth Circuit also held that "whether app developers are direct purchasers of distribution services from Apple in the sense of *Illinois Brick* makes no difference to our analysis." *Id.* at 20a. This was despite the panel's recognition that an affirmative answer to that question "would necessarily imply that the developers, as direct purchasers of those services, could bring an antitrust suit against Apple" for the same commissions Respondents challenge here. *Id.* The panel thus expressly opened the door to duplicative recoveries by different plaintiff groups.

The Ninth Circuit acknowledged that it was creating a circuit split with at least the Eighth Circuit's decision in *Campos*, by endorsing the dissent's

reasoning in that case. *See id.* at 19a ("We disagree with the majority's analysis in *Ticketmaster*.").

Apple sought rehearing *en banc*, but the court of appeals denied the petition without opinion. *Id.* at 38a-39a

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decision merits review, first, because of the acknowledged split with the Eighth Circuit's *Campos v. Ticketmaster Corp.*, 140 F.3d 1166 (8th Cir. 1998), *cert. denied*, 525 U.S. 1102 (1999) decision, which is even broader than the Ninth Circuit recognized.

Campos considered an electronic marketplace structured around an agency sales model, much like the App Store. The Eighth Circuit approached the *Illinois Brick* issues properly, rejecting any formalistic focus on distribution—including the fact that Ticketmaster transacted with, and delivered tickets to, consumers. More important was that the consumer plaintiffs were complaining about the monopolization of a service (ticket distribution services) that Ticketmaster provides not to the plaintiff ticket buyers, but *to concert venues* (much as Apple provides distribution services to app developers). The Eighth Circuit therefore reasoned correctly that the plaintiffs' injury had to be a derivative one, undoubtedly presented pass-through issues, and therefore was barred by *Illinois Brick*.

Asked by this Court for its views, the Solicitor General opined that "the court of appeals' holding that the direct purchaser rule of *Illinois Brick* . . . precludes petitioners from recovering damages . . . based on

Ticketmaster's alleged overcharges is both correct and conventional." *Campos* U.S. & FTC Br. 5-6.

The Ninth Circuit's contrary approach cannot be reconciled with this Court's precedents in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) and *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968). The whole point of those decisions was to identify the one plaintiff (or class of plaintiffs) who paid the disputed charge directly and to give that plaintiff exclusive standing to sue for the entire overcharge. Any claims that would depend on allegations of pass-through harm are barred, in order to avoid complex factual disputes about apportionment and duplicative recoveries. The dissenters in *Illinois Brick* would have approached these issues differently, based on their view that Congress, in enacting Section 4 of the Clayton Act, 15 U.S.C. § 15, "intended to protect individual consumers who purchase through middlemen." *Illinois Brick*, 431 U.S. at 749 (Brennan, J., dissenting).[5] But the *Illinois Brick* majority adopted a different interpretation of Section 4, and the Court in *Kansas v. UtiliCorp United Inc.*, 497 U.S. 199, 217 (1990), chose to "stand by [that] interpretation." The Ninth Circuit does not have the authority to change that.

By focusing only on whether the defendant delivers or "distributes" goods to the plaintiff, the Ninth Circuit's new standard divorces the *Illinois Brick* doctrine from the objectives that this Court identified

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[5] The author of the panel opinion made clear at the opening of oral argument that he thinks "Justice Brennan got it right in *Illinois Brick*." CA9 Oral Argument at 4:20, *Pepper v. Apple Inc.*, No. 14-15000 (Feb. 10, 2016), http://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000009059.

as critical. Who *delivers goods* is not even germane to this Court's *Illinois Brick* analysis, as the Third Circuit correctly held in *Howard Hess Dental Laboratories Inc. v. Dentsply International, Inc.*, 424 F.3d 363, 373 (3d Cir. 2005), *cert. denied*, 547 U.S. 1163 (2006). There is not a word in *Hanover Shoe*, *Illinois Brick*, or *UtiliCorp* suggesting that this Court thought that the right way to approach an *Illinois Brick* issue is to force the facts into a manufacturer-distributor dichotomy, let alone emphasize the "distributor's" role in delivering goods. In contrast, the focus on pass-through dynamics—"the intricacies of tracing the effect of an overcharge on the purchaser's prices, costs, sales, and profits"—is pervasive. *Illinois Brick*, 431 U.S. at 744. The only thing that can be said with certainty about the Ninth Circuit's approach is that it will always permit the ultimate consumer to sue someone—the outcome favored by the *Illinois Brick* dissent but rejected by the majority. The Ninth Circuit would not even rule out duplicative litigation by app developers to recover *the exact same commissions* from Apple, a clear repudiation of the policies against double recovery that drive *Illinois Brick*.

The Ninth Circuit's decision implicates issues of exceptional national importance. This is not a one-off case that can be dismissed as an outlier. Along with *Campos*, it is the most important case to have come along testing the application of *Illinois Brick* to electronic marketplaces. Those marketplaces serve hundreds of billions of dollars in commerce annually, and they are growing fast. The Ninth Circuit's new test essentially treats operators of electronic marketplaces as if they were the owners and direct sellers of every item that passes through their

marketplaces, and as if a commission that *sellers* have agreed to pay is actually charged to and paid by *buyers*. Worse, it appears to allow both buyers and sellers to sue, and potentially to recover twice for the exact same charges. That is a punitive and unwise way for antitrust law to treat some of our most vibrant and important new industries. And since the technology companies operating these marketplaces are disproportionately located in the Ninth Circuit, and in any event do a tremendous volume of business there, class actions of this nature will be brought in the Ninth Circuit. Deferring review in hopes of further percolation therefore would be inappropriate. This Court should step in now.

I. THE NINTH CIRCUIT'S "DISTRIBUTOR FUNCTION" RULE CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS

The Ninth Circuit acknowledged that its decision conflicts with the Eighth Circuit's decision in *Campos*. That conflict—broader than the Ninth Circuit acknowledged—merits review.

Campos is the leading case applying *Illinois Brick* to an agency sales arrangement like the App Store, and an example of a court looking beyond superficialities of form and deep into the substance of a plaintiff's claim to determine whether its damage theory implicated pass-through concerns. Buyers of concert tickets sued Ticketmaster for allegedly monopolizing the market for ticket distribution services for large-scale popular music events. *Campos*, 140 F.3d at 1168-69. They sought to recover damages based on allegedly supracompetitive ticket service fees they paid "directly to Ticketmaster." *Id.* at 1171. The allegedly monopolized services, however, were purchased by

concert venues, not plaintiffs. Ticketmaster was transacting business with the consumer plaintiffs because it had entered into venue agreements whereby the venues granted to Ticketmaster a right "to sell [tickets] as Principal's agent." *Campos* U.S. & FTC Br. 9. Indeed, those agreements set the "service fees" and "handling fees" that ticket buyers paid. Ticketmaster's actual compensation for its distribution services was set by contract with the venues. *Campos*, 140 F.3d at 1169.

The Eighth Circuit held that because the ticketing fee was a product of and reflected Ticketmaster's alleged upstream monopoly power over concert venues—the only purchasers of the monopolized service—the directly injured parties were the venues rather than the consumers. First the court held that the "billing practice[ ]," that Ticketmaster transacted with plaintiffs and collected a distinct service fee on each sale, was not determinative. *Id.* at 1171 ("[E]ven if a separate charge for gasoline were assessed [to a taxi passenger], the taxi passenger still could not be considered a direct purchaser [of gasoline] in any sense." (first alteration added) (quoting *McCarthy v. Recordex Serv., Inc.*, 80 F.3d 842, 853 n.17 (3d Cir.), *cert. denied*, 519 U.S. 825 (1996))). What mattered more was the fact that the venues plainly were the first and most direct victims of the allegedly illegal conduct, since they alone purchased the allegedly monopolized service. Ticket buyers were indirect purchasers because, while they may indeed have paid "some portion of the monopoly overcharge," they did so "only because the previous purchaser [the venue] was unable to avoid that overcharge." *Id.* at 1170.

As noted earlier, the Solicitor General reviewed the *Campos* decision at this Court's invitation, and agreed it was correct:

> It would be contrary to the rationale of *Illinois Brick* to allow ticket buyers to recover damages attributable to Ticketmaster's alleged monopoly overcharges merely because of the particular nature of the input that Ticketmaster supplies to the venues (*i.e.*, Ticketmaster's services as the venues' agent in dealing with ticket buyers). Clearly, the venues could also assert claims for overcharge damages as direct purchasers of Ticketmaster's services. If ticket buyers could recover damages for those same overcharges, Ticketmaster would face the risk of duplicative damages liability, a risk that this Court "d[id] not find * * * acceptable" in *Illinois Brick*[,] 431 U.S. at 731 n.11. Or, alternatively, the courts would have to engage in "massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge," *id.* at 737, the very exercise that the direct purchaser rule of *Illinois Brick* was designed to avoid.

Campos U.S. & FTC Br. 12 (third alteration added).

The United States also directly addressed the proper treatment of agency selling arrangements like the App Store. It explained that because Ticketmaster was acting "as the venue's 'agent' for ticket distribution services," consumers were direct

purchasers *from the venues* rather than from Ticketmaster, "even though ticket buyers . . . deal with Ticketmaster, and not with the venue, when they purchase tickets." *Id.* at 10; *see also id.* at 14 (explaining that *Campos* correctly applies *Illinois Brick* principles to "the unusual case, such as this one, in which the monopolist, as agent for the direct buyer, deals with the indirect buyer").

Apple would clearly prevail under *Campos*. Like Ticketmaster, it is an agent selling goods for principals, accused of monopolizing a distribution service sold to the principals. Consumers in both cases are "downstream," buying the principals' goods at allegedly inflated prices. If anything, this is an easier case than *Campos* because tens of thousands of app developers set apps prices, creating unimaginably complicated pass-through issues. Yet the Ninth Circuit's "distributor function" rule ignores those issues altogether.

No Circuit other than the Ninth uses this "distributor function" rule; the only out-of-circuit citation by the Ninth Circuit was to the *Campos* dissent. And in *Dentsply*, the Third Circuit specifically rejected the proposition that who delivers goods prevails over who sells them. 424 F.3d at 372-73. In that case, various groups of dental labs tried to sue Dentsply for monopolization, even though artificial teeth are typically sold by manufacturers (such as Dentsply) to middle-man dealers, which then add a markup and resell the teeth to dental labs. *Id.* at 366. One group of labs argued that at least when Dentsply drop-shipped the teeth straight to the labs, the labs "were direct purchasers not subject to *Illinois Brick*." *Id.* at 372. The Ninth Circuit, following the principles

of the decision below, would have agreed: since Dentsply handled the marketplace "function" of delivering the goods to the labs, the labs were direct purchasers. But the Third Circuit gave that argument short shrift. It sensibly recognized that the delivery of the goods by the manufacturer was only a "formal difference" that "d[id] not affect the economic substance of the transaction." *Id.* at 373. The economic substance was that the labs were buying from the dealers, paying the dealers "their usual price," which reflected "the dealers tak[ing] their profit." *Id.*

By crafting a new "distributor function" approach to *Illinois Brick* that elevates form over substance, the Ninth Circuit has created a clear and acknowledged circuit split that should be resolved by this Court.

II. THE NINTH CIRCUIT'S DECISION PERMITS PASS-THROUGH DAMAGES AND DUPLICATIVE RECOVERIES, IN SQUARE CONFLICT WITH THIS COURT'S DECISIONS

Certiorari is also merited on the basis of a square conflict with this Court's decisions, and a resulting multi-layered conflict with how other circuits approach *Illinois Brick* generally. In short, the Ninth Circuit has ignored the fundamental policies underlying *Illinois Brick*—avoiding pass-through theories of harm and duplicative recoveries—in favor of a formalistic distinction that finds no support in this Court's or other circuit courts' decisions.

A. The *Illinois Brick* Doctrine Does Not Permit Pass-Through Theories Of Harm

The *Illinois Brick* doctrine is about one recurring problem in antitrust litigation: what to do when the effects of anticompetitive conduct get "passed-through" a distribution chain. *Hanover Shoe* and *Illinois Brick* successively dealt with the two sides of the pass-through problem, and together ensure that courts and juries hearing antitrust cases never need to evaluate whether some or all of an alleged overcharge was, or was not, passed through to subsequent purchasers.

In *Hanover Shoe*, this Court held that an antitrust defendant could not lessen its exposure to damages with a pass-through *defense*, *i.e.*, it could not say that the plaintiff suffered no loss or less loss because it had passed on the overcharge, in whole or in part, to its own customers. 392 U.S. at 489, 492. Rather, the Court held, for purposes of Section 4 of the Clayton Act, 15 U.S.C. § 15, a plaintiff that purchased goods or services at an inflated price as a result of anticompetitive conduct by a supplier has suffered damage in the *full amount* of the overcharge. *Hanover Shoe*, 392 U.S. at 487-91. Allowing even a limited pass-on defense, this Court recognized, would inevitably lead to "complicated proceedings involving massive evidence and complicated theories" aimed at economic incidence and pass-through issues that are notoriously difficult to unravel, seriously threatening the vitality and practicality of antitrust enforcement. *Id.* at 493.

In *Illinois Brick*, this Court addressed the other side of the same coin—whether an indirect purchaser, who bears an overcharge only to the extent that it was passed on by a direct purchaser, can sue for damages.

431 U.S. at 724. The Court held that Section 4 of the Clayton Act precludes the use of pass-through theories of harm by plaintiffs as well. *Id.* at 735. In this Court's view, "the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers rather than allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it." *Id.* at 734-35. This Court carefully considered an asymmetric outcome whereby plaintiffs could pursue pass-through theories (even if defendants could not under *Hanover Shoe*), but rejected that approach because of the "serious risk of multiple liability for defendants" that would result. *Id.* at 730. The holding of *Illinois Brick* is that "the overcharged direct purchaser, and not others in the chain of manufacture or distribution, is the party 'injured in his business or property' within the meaning of the [Clayton Act]." *Id.* at 729.

Justice Brennan dissented, arguing essentially as a matter of statutory construction that Congress intended that consumers would always have a damages claim. In particular, the dissent divined, from recent legislation allowing *parens patriae* actions by States on behalf of their citizens, that Congress must have favored consumer class actions generally, irrespective of whether they presented pass-through issues. *Id.* at 765 n.24 (Brennan, J., dissenting). The majority rejected this argument. *Id.* at 733 n.14. The dissent also argued that apportioning an overcharge throughout a distribution chain is no more difficult than other challenges in antitrust litigation. *See id.* at 758-59 & n.14 (Brennan, J., dissenting). The majority disagreed with that too, adding: "In any event, as we understand the dissenters' argument, it reduces to the

proposition that, because antitrust cases are already complicated, there is little harm in making them more so. We disagree." *Id.* at 743 n.27.

The Court reaffirmed its *Illinois Brick* analysis in *UtiliCorp*, which addressed who may sue "when, in violation of the antitrust laws, suppliers overcharge a public utility for natural gas and the utility passes on the overcharge to its customers." 497 U.S. at 204. Two states, suing as *parens patriae* on behalf of consumers and state agencies that purchased natural gas from the defendant utility, argued that indirect purchaser suits should be allowed "in cases involving regulated public utilities that pass on 100 percent of their costs to their customers." *Id.* at 208. The Court disagreed, reasoning that there was a pass-through issue even on these facts, and that it would be "an unwarranted and counterproductive exercise to litigate a series of exceptions" to *Illinois Brick* simply because some cases are easier than others. *Id.* at 217. "Having stated the rule in *Hanover Shoe*, and adhered to it in *Illinois Brick*, we stand by our interpretation of § 4." *Id.*

Most other circuits have recognized, repeatedly and correctly, that antitrust standing under *Illinois Brick* turns on whether the plaintiff's particular claim presents a theory of pass-through harm. The Fifth Circuit has explained that "[w]hat is critical" to an *Illinois Brick* analysis is "whether the plaintiff's action (or the defendant's defense) asserts a form of passing-on theory." *Pony Creek Cattle Co. v. Great Atl. & Pac. Tea Co. (In re Beef Indus. Antitrust Litig.)*, 600 F.2d 1148, 1160 (5th Cir. 1979). The Sixth Circuit has explained that if a plaintiff's theory of harm would require it to "prove what portion of the [alleged] illegal overcharge" was "passed on in the form of a higher

price" for what he purchased, his claim is barred. *Jewish Hosp. Ass'n of Louisville, Ky., Inc. v. Stewart Mech. Enters., Inc.*, 628 F.2d 971, 974 (6th Cir. 1980), *cert. denied*, 450 U.S. 966 (1981). The Fourth Circuit's decision in *Dickson v. Microsoft Corp.* holds that whenever "the court would be required to determine the over-charge, if any, for [the monopolist's product] that was passed on to consumers," *Illinois Brick* bars the claim. 309 F.3d 193, 215 (4th Cir. 2002). The leading antitrust treatise urges antitrust courts to focus on this economic substance, explaining: "When distribution chains are complex, making it difficult to identify who dealt directly and who indirectly, it is less important that the court formalistically identify a direct purchaser and more important that it adhere to the principles that the *Illinois Brick* rule reflects." 2A Phillip E. Areeda et al., *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 346j (3d ed. 2007).

Respondents' damages claim against Apple clearly depends on a theory of pass-through harm that would require the trier of fact to tackle exactly the questions that *Illinois Brick* placed off-limits. Respondents complain of a 30% commission that Apple charges developers, and claim that as a result of that commission the prices of apps are higher than what they otherwise would be. *See* Pet. App. 43a, 52a (¶¶ 8, 41). The district court found, Respondents effectively concede,[6] and it is undeniably the case that Apple's 30% commission will impact consumers only to the

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[6] *See* CA9 Plaintiffs-Appellants Opening Br. 35 n.10 (acknowledging that the commission Apple imposes on third-party developers causes those developers to "mark-up the price [of their apps]").

extent that it has some effect on the prices third-party developers choose for the apps they sell through the App Store. Yet *how* it will affect the pricing decisions of developers—and therefore how apps buyers are affected—is precisely the question that *Illinois Brick* did not want antitrust courts to entertain. *See* 431 U.S. at 732 ("[T]he attempt to trace the complex economic adjustments to a change in the cost of a particular factor of production would greatly complicate and reduce the effectiveness of already protracted treble damages proceedings . . . ."); *see also Hanover Shoe*, 392 U.S. at 493 (the Court does not allow proof of what the direct purchaser might have done because of the "nearly insuperable difficulty" of the issue).

The pass-through issues presented here are in fact exceptionally difficult. One cannot just assume that if Apple's commission did not exist, developers would want to price every one of the millions of apps in the App Store exactly 30% lower. Under the relevant "tax incidence" analysis, economically rational app developers would consider the particular supply and demand conditions *for each app*, and choose prices accordingly.[7] A pass-through analysis would therefore

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[7] In *Illinois Brick*, the Court noted the basic principle of "tax incidence" analysis. *See* 431 U.S. at 741 ("*If* the market for the passer's product is perfectly competitive; *if* the overcharge is imposed equally on all of the passer's competitors; and *if* the passer maximizes its profits, then the ratio of the shares of the overcharge borne by passee and passer will equal the ratio of the elasticities of supply and demand in the market for the passer's product." (emphasis added)). The Court also noted how hard this principle is to implement in practice, highlighting "a serious problem of measuring the relevant elasticities." *Id.* at 742. Here, where each App will have a unique cost structure and unique

require one to estimate but-for pricing decisions app-by-app countless times.[8]

Contrast that complexity with the zero-tolerance approach to pass-through that this Court adopted in *UtiliCorp*. In *UtiliCorp* there was a credible argument that regulated utilities *always* pass on 100% of natural gas price increases to consumers, who *necessarily* pay the same regulated energy prices. This Court nevertheless disallowed *parens patriae* actions on behalf of consumers. 497 U.S. at 208-12. The Court wrote: "As we have stated before, '[t]he task of disentangling overlapping damages claims is not lightly to be imposed upon potential antitrust litigants, or upon the judicial system.'" *Id.* at 211 (quoting *Blue Shield of Va. v. McCready*, 457 U.S. 465, 475 n.11 (1982)). Therefore, acknowledging that "[t]he rationales underlying *Hanover Shoe* and *Illinois Brick* will not apply with equal force in all cases," *id.* at 216, the Court found the seemingly simple pass-through issue disqualifying, *see id.* at 210-11.

Despite these facts and this Court's doctrine, the Ninth Circuit's decision *fails even to discuss whether Respondents' damages claims would implicate pass-through dynamics*. That had been the district court's focus, and it found that the harm alleged by Respondents "is an indirect effect resulting from the

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elasticities of supply and demand, the complexities are as daunting as they possibly could be.

[8] It is actually much worse than that, since as noted earlier iOS developers today make most of their money from in-app purchases. Accordingly, true but-for prices would be a combination of the up-front app price plus in-app purchases. And as if that is not enough, developers usually make a version of their iOS apps for other platforms, like Android, and generally strive to adopt the same pricing structure across platforms.

software developers' own costs." *But the Ninth* Circuit's sole focus on "functions" was so extreme that it failed to address this finding or any other aspect of the pass-through issue. This willful indifference to the pass-through problem may be its strongest repudiation of this Court's doctrine.

The bottom line is that if Respondents have a damages action against Apple, it necessarily will require the trier of fact to consider whether, and to what extent, Apple's commission was passed through in the prices that developers selected for the particular apps that Respondents purchased. That is precisely the enterprise that this Court placed off-limits in *Illinois Brick* and *Hanover Shoe*, and that other circuits consistently recognize as the most important consideration in any *Illinois Brick* analysis.

B. The *Illinois Brick* Doctrine Does Not Permit Duplicative Recoveries

Hanover Shoe and *Illinois Brick* also work together to ensure that suits by indirect purchasers do not lead to duplicative recoveries. *See Illinois Brick*, 431 U.S. at 731 ("[W]e are unwilling to 'open the door to duplicative recoveries' under § 4." (quoting *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 264 (1972)); *see also UtiliCorp*, 497 U.S. at 208, 212, 214.

The Ninth Circuit, however, was openly indifferent to the prospect of duplicative recoveries here. It held that "it makes no difference to our analysis" "whether app developers are direct purchasers of distribution services from Apple in the sense of *Illinois Brick*," even if that "would necessarily imply that the developers, as direct purchasers of those services, could bring an antitrust suit" themselves and seek Apple's 30% commission as damages. Pet. App. 20a.

To any antitrust lawyer that has been practicing for the past 40 years, this is nothing short of heresy. It is fundamental that the *Illinois Brick* doctrine seeks to identify the *one* set of plaintiffs in the chain of distribution who can sue for the *entire* overcharge, to the exclusion of every other possible plaintiff. As the Eleventh Circuit has explained, "the direct purchaser rule only permits the first purchaser to recover damages . . . for any unlawful overcharge" in order to "eliminate[] the possibility that direct and indirect purchasers could seek duplicative recoveries against the antitrust violator." *Lakeland Reg'l Med. Ctr., Inc. v. Astellas US, LLC*, 763 F.3d 1280, 1285 (11th Cir. 2014). The Third Circuit has similarly recognized that "the scope of *Illinois Brick*'s rule barring treble damages actions by certain persons must be determined in each case by examining whether allowing those persons to sue could create the possibility of duplicative recovery." *Mercan. Inc. v. Caterpillar Tractor Co.*, 713 F.2d 958, 967-68 (3d Cir. 1983), *cert. denied*, 465 U.S. 1024 (1984). Other circuits have likewise applied *Illinois Brick* to deny standing to plaintiffs whose claims would give rise to potential duplicative recoveries. *See, e.g., Simon v. KeySpan Corp.*, 694 F.3d 196, 204 (2d Cir. 2012) (reasoning that in addition to a retail purchaser, "[t]he fact that [an electric utility] would be a proper plaintiff to sue [a wholesale electricity producer] for the same conduct implicates *Illinois Brick*'s concerns about duplicative recovery"), *cert. denied*, 133 S. Ct. 1998 (2013); *Cohen v. Gen. Motors Corp. (In re New Motor Vehicles Canadian Export Antitrust Litig.)*, 533 F.3d 1, 5 (1st Cir. 2008) (holding that permitting car lessees to sue car manufacturers for conspiring to prevent lower priced Canadian cars from entering the U.S. market

would "risk duplicative recovery" as car dealers could also "initiat[e] their own suit"); *Adams v. Pan Am. World Airways, Inc.*, 828 F.2d 24, 30 (D.C. Cir. 1987) (recognizing that under *Illinois Brick* "multiple recovery should be avoided" and thus "allowance of indirect purchaser suits would compel apportionment of recovery"), *cert. denied*, 485 U.S. 961 (1988).

How, then, could a clear prospect of a duplicative recovery not matter to an *Illinois Brick* analysis? The only possible answer is, *if one silently applies the Illinois Brick dissent.* Justice Brennan argued that the risk of duplicative recovery would be relatively small and manageable, and therefore should not stand in the way of consumer overcharge claims. *See Illinois Brick*, 431 U.S. at 761-65 (Brennan, J., dissenting). Yet this Court firmly disagreed, *id.* at 731-32, and *UtiliCorp* reaffirmed that "[t]he *Illinois Brick* rule also serves to eliminate multiple recoveries," 497 U.S. at 212.

Certiorari is necessary to bring the Ninth Circuit back into step with the clear command of this Court's precedents, and the strong consensus of the other circuits. Indeed, the error in saying that it "makes no difference" if two sets of plaintiffs at two different market levels have standing to sue for the same damages is stark enough to warrant summary reversal.

C. The Ninth Circuit's "Distributor Function" Rule Is Unrelated To The Basis For The *Illinois Brick* Doctrine

In lieu of identifying pass-through damages and the potential for duplicative recoveries, the Ninth Circuit would focus on "functions" and delivery. These concepts, however, find no support in this Court's precedents. There is *nothing* in *Hanover Shoe*,

Illinois Brick, or *UtiliCorp* that so much as hints at this approach.

The Ninth Circuit tried to justify its new rule by pointing out that in this Court's leading cases "distributors" were held to be direct purchasers from "manufacturers," and end consumers were held to be direct purchasers from distributors or retailers. That is true, and of course it is often the case that distributors are the direct purchasers from manufacturers, and consumers are the direct purchasers from distributors. The Ninth Circuit has nevertheless confused the legal standard with the particular factual setting to which this Court had occasion to apply that standard. Respectfully, the legal and economic basis for this Court's doctrine is perfectly obvious, and it has nothing to do with shoehorning all commerce into some manufacturer-distributor dichotomy.

The manufacturer-distributor dichotomy does not even fit this case, which concerns agency selling. The reason that "distributors" are usually amenable to suits by consumers is because distributors ordinarily buy from manufacturers and then resell to consumers at prices the distributor sets. Antitrust misconduct by the distributor does not present a pass-through problem in such circumstances, because there is no intermediary between the distributor and the consumer that might absorb some or all of that distributor-established overcharge. In agency selling, however, the agent sets only the commission price charged to its principals (for acting as their agent), not the prices consumers pay for the principals' goods. In the present case, the prices of iOS apps are set entirely by third-party developers, who know with certainty

that the prices they set will be the prices that consumers pay. It therefore makes no sense to liken the agent to a price-setting distributor, when agents like Apple have no price-setting role whatever.

The Ninth Circuit's novel focus on marketplace "functions" and who delivers goods breaks the connection between the *Illinois Brick* rule and the purpose it was designed to serve—keeping antitrust courts out of the business of adjudicating pass-through issues.

III. THE NINTH CIRCUIT'S DECISION PRESENTS ISSUES OF NATIONAL IMPORTANCE THAT MERIT REVIEW BY THIS COURT

The Ninth Circuit's decision destabilizes the law on questions of exceptional importance, particularly to participants in electronic commerce. The Ninth Circuit was oblivious to the ramifications of the agency model by which Apple operates the App Store. Yet the same or similar agency or consignment sales models are increasingly prevalent in online electronic commerce and facilitate billions of dollars in transactions annually. *See* Vibhanshu Abhishek et al., *Agency Selling or Reselling? Channel Structures in Electronic Retailing*, 62 Mgmt. Sci. 2259, 2259-60, 2275 (2016). In addition to Apple's App Store, a few other notable examples of this model are Google's Play (originally "Android") marketplace, StubHub's ticket resale site, eBay's hugely popular auction site, Amazon's "Amazon Marketplace" business, and Facebook's "Marketplace."

The "key distinction between the reselling and agency selling formats is who sets the retail prices—in agency selling the retail prices are decided by the manufacturer, whereas in reselling they are decided by

the e-tailer." *Id.* at 2259-60. As the United States recognized in *Campos*, that difference has crucial consequences for an appropriate application of *Illinois Brick* standing analysis. In an agency sales model the manufacturer or content owner's costs, demand function, incentives, and competitive constraints determine prices product-by-product. *Id.* at 2259, 2264-76. A claim that the commission paid by developers to the platform sponsor ultimately harmed consumers therefore requires exactly the sort of "famously difficult" pass through analysis that *Illinois Brick* forbids.

Nonetheless, essentially every company that sponsors an electronic marketplace "delivers" some goods—the function that the Ninth Circuit found dispositive. StubHub delivers tickets—as the agent of its customer (the ticket seller). Google will deliver a copy of Angry Birds™—as the agent of the developer. And of course Apple delivers apps—as the agent of the developer. Under the Ninth Circuit's decision, every one of these online platform providers may be sued by consumers so long as they have fulfilled the customer's order, even for practices that in the first instance affect developers, content owners, or other upstream entities. All of the considerations that are critical under *Illinois Brick* and the direct purchaser doctrine—pricing dynamics; pass-through dynamics; and even a clear potential for duplicative lawsuits and double-recovery—are irrelevant. That holding is deeply threatening to electronic commerce (as well as to agents and shipping companies in traditional "brick and mortar" commerce) and its effect is especially pernicious given the concentration of electronic commerce companies in the Ninth Circuit. Indeed,

after this decision it seems unlikely that an antitrust class action against the major ecommerce companies would be filed anywhere *other* than the Ninth Circuit.

The Ninth Circuit's decision in this case reopens a Pandora's Box that this Court carefully closed over 40 years ago. It forthrightly conflicts with the Eighth Circuit in *Campos*, and to the considered views of the United States expressed to this Court in *Campos*. And it throws into disarray principles that have long been settled, nationwide, thereby leading once again to complicated judicial proceedings, a lessening of practical and robust antitrust enforcement, and arbitrary and punitive consequences for some of our most important and vibrant emerging industries. Such a profoundly impactful decision should not be left to stand without this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 2, 2017

APPENDIX

RECORD AND BRIEFS

17-204

No. 17-___

In the Supreme Court of the United States

IN RE APPLE IPHONE ANTITRUST LITIGATION,

APPLE INC.,

Petitioner,

v.

ROBERT PEPPER, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 14-15000

IN RE APPLE IPHONE ANTITRUST LITIGATION,

Robert Pepper; Stephen H. Schwartz; Edward W. Hayter; Eric Terrell, Plaintiffs–Appellants,

v.

Apple Inc., Defendant–Appellee.

Appeal from the United States District Court for the Northern District of California

Argued and Submitted February 10, 2016
San Francisco, California
Filed January 12, 2017
846 F.3d 313

Before: A. WALLACE TASHIMA and WILLIAM A. FLETCHER, Circuit Judges, and ROBERT W. GETTLEMAN,** District Judge.

OPINION

W. FLETCHER, Circuit Judge:

In their current complaint, Plaintiffs allege that they purchased iPhones and iPhone applications ("apps") between 2007 and 2013, and that Apple has monopolized and attempted to monopolize the market

** The Honorable Robert W. Gettleman, United States District Judge for the Northern District of Illinois, sitting by designation.

for iPhone apps. In ruling on Apple's fourth motion to dismiss, the district court held that Plaintiffs lacked antitrust standing under *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977).

We must decide two questions. First, we must decide whether Rule 12(g)(2) barred the district court from considering on the merits Apple's fourth motion to dismiss, brought under Rule 12(b)(6), in which Apple contended that Plaintiffs lack statutory standing under *Illinois Brick*. We conclude that the district court may have erred in considering this motion on the merits, but that its error, if any, was harmless. Second, we must decide whether Plaintiffs lack statutory standing under *Illinois Brick*. We hold that Plaintiffs are direct purchasers from Apple within the meaning of *Illinois Brick* and therefore have standing

I. Factual Allegations

The following factual narrative is drawn from Plaintiffs' current complaint. Because the district court dismissed Plaintiffs' suit under Rule 12(b)(6) for failure to state a claim, we take as true all plausible allegations.

Apple released the iPhone in 2007. The iPhone is a "closed system," meaning that Apple controls which apps—such as ringtones, instant messaging, internet, video, and the like—can run on an iPhone's software. In 2008, Apple launched the "App Store," an internet site where iPhone users can find, purchase, and download iPhone apps. Apple has developed some of the apps sold in the App Store, but many of the apps sold in the store have been developed by third-party developers. Apple earns a commission on each third-party app purchased for use on an iPhone. When a customer purchases a third-party iPhone app, the

payment is submitted to the App Store. Of that payment, 30% goes to Apple and 70% goes to the developer.

Apple prohibits app developers from selling iPhone apps through channels other than the App Store, threatening to cut off sales by any developer who violates this prohibition. Apple discourages iPhone owners from downloading unapproved apps, threatening to void iPhone warranties if they do so.

II. Procedural History

The procedural history of this case is complex. We describe as much of the history as is necessary to resolve the procedural question before us. Four named plaintiffs filed a putative antitrust class action complaint ("Complaint 1") against Apple on December 29, 2011. Counts I and II of Complaint 1 alleged monopolization and attempted monopolization of the iPhone app market by Apple. Count III alleged a conspiracy between Apple and AT&T Mobility, LLC ("ATTM") to monopolize the voice and data services market for iPhones. Plaintiffs alleged that they had purchased iPhones, but did not allege that they had ever purchased, or attempted to purchase, iPhone apps. On March 2, 2012, Apple moved to dismiss the entire complaint under Rule 12(b)(7) for failure to join ATTM as a defendant. This motion to dismiss was mooted when the district court consolidated the action with another action.

Seven named plaintiffs, including the original four plaintiffs, then filed a consolidated putative class action complaint ("Complaint 2") against Apple on March 21, 2012. The allegations in Complaint 2 were essentially the same as those in Complaint 1, and the same three Counts were alleged. None of the named plaintiffs

alleged that they had bought, or attempted to buy, an iPhone app. ATTM was not added as a defendant. On April 16, 2012, Apple moved again to dismiss the entire complaint under Rule 12(b)(7) for failure to join ATTM as a defendant. In the alternative, it moved to dismiss Count III under Rule 12(b)(6) for failure to state a claim for conspiracy between Apple and ATTM. The district court granted without prejudice the motion to dismiss the entire complaint, even though Counts I and II alleged no wrongdoing by ATTM. The court specifically ordered Plaintiffs either to add ATTM as a defendant or to forgo Count III. It denied without prejudice Apple's motion to dismiss Count III under Rule 12(b)(6) on the ground that, in the absence of ATTM, the motion was premature.

Plaintiffs filed an amended consolidated complaint ("Complaint 3") on September 28, 2012. Complaint 3 was essentially the same as Complaint 2, except that Count III was now labeled as "Preserved for Appeal." None of the named plaintiffs alleged that they had ever purchased, or sought to purchase, iPhone apps, and ATTM was not named as a defendant. On November 2, 2012, Apple moved under Rule 12(f) to strike Claim III on the ground that ATTM had still not been named as a defendant. As part of the same motion, Apple moved to dismiss Counts I and II under Rule 12(b)(1) for lack of Article III standing, and under Rule 12(b)(6) for lack of statutory standing under *Illinois Brick*. This was the first time Apple had moved to dismiss Counts I and II. Relying on Rule 12(g)(2), Plaintiffs opposed Apple's motion to dismiss under Rule 12(b)(6) on the ground that Apple had not moved to dismiss these claims under Rule 12(b)(6) in its two previous motions under Rule 12.

The district court granted the Rule 12(f) motion to strike Count III. The district court also granted the Rule 12(b)(1) motion to dismiss Counts I and II for lack of subject matter jurisdiction, holding that Plaintiffs lacked Article III standing to bring those counts because Plaintiff failed to allege that they had purchased or attempted to purchase an iPhone app. The court declined to rule on the Rule 12(b)(6) motion to dismiss under *Illinois Brick*, concluding that, in the absence of an alleged Article III injury, any ruling would be advisory. The district court dismissed with leave to amend.

Plaintiffs filed a second amended consolidated complaint ("Complaint 4") on September 5, 2013. Complaint 4 alleged only the iPhone app monopolization claims, which had been Counts I and II of all of the earlier complaints. For the first time, Plaintiffs alleged that they had purchased iPhone apps, thereby alleging sufficient injury under Article III to support Counts I and II. Complaint 4 added the following allegation specifically addressed to statutory standing under *Illinois Brick*

> When an iPhone customer buys an app from Apple, it pays the full purchase price, including Apple's 30% commission, directly to Apple.... Apple sells the apps (or, more recently, licenses for the apps) directly to the customer, collects the entire purchase price, and pays the developers after the sale. The developers at no time directly sell the apps or licenses to iPhone customers or collect payments from the customers.

On September 30, 2013, Apple filed a motion to dismiss under Rule 12(b)(6), contending that Plaintiffs

lacked statutory standing under *Illinois Brick*. The district court agreed and dismissed Complaint 4 with prejudice. Plaintiffs timely appealed.

III. Standard of Review

We review de novo alleged errors of law in interpreting Rule 12. *See Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 973 (9th Cir. 2010). We review de novo dismissals for failure to state a claim under Rule 12(b)(6). *Carlin v. DairyAmerica, Inc.*, 705 F.3d 856, 866 (9th Cir. 2013).

IV. Discussion

Plaintiffs make three arguments on appeal, of which we need to reach only two. First, Plaintiffs argue that Rule 12(g)(2) barred Apple from raising its *Illinois Brick* statutory standing defense in its fourth Rule 12 motion to dismiss, and that the district court erred in deciding the motion on the merits. Second, Plaintiffs argue that the district court erred in characterizing them as indirect purchasers from Apple, and therefore without statutory standing under *Illinois Brick*. We address these two arguments in turn.

A. Late-filed Motions to Dismiss under Rule 12(b)(6)

Rule 12(g)(2) provides, "Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion." The consequence of omitting a defense from an earlier motion under Rule 12 depends on type of defense omitted. A defendant who omits a defense under Rules 12(b)(2)–(5)—lack of personal jurisdiction, improper venue, insufficient process, and insufficient service of process—entirely waives that defense. Fed. R. Civ. P.

12(h)(1)(A). A defendant who omits a defense under Rule 12(b)(6)—failure to state a claim upon which relief can be granted—does not waive that defense. Rule 12(g)(2) provides that a defendant who fails to assert a failure-to-state-a-claim defense in a pre-answer Rule 12 motion cannot assert that defense in a later pre-answer motion under Rule 12(b)(6), but the defense may be asserted in other ways. Fed. R. Civ. P. 12(h)(2).

Our sister circuits disagree about the proper interpretation and application of Rule 12(g)(2). The Seventh Circuit has held that Rule 12(g)(2) does not foreclose a motion to dismiss under Rule 12(b)(6) when there has been a previous motion to dismiss under Rule 12. *See Ennenga v. Starns*, 677 F.3d 766, 773 (7th Cir. 2012) ("Rule 12(g)(2) does not prohibit a new Rule 12(b)(6) argument from being raised in a successive motion."). The Seventh Circuit misunderstands Rule 12, reading Rule 12(h)(1) to provide the only sanction for failure to raise a Rule 12 defense in a prior motion under the Rule. It is true that Rule 12(h)(1) singles out several Rule 12 defenses for an especially severe sanction. If a defense under Rule 12(b)(2)–(5) is not asserted in the first Rule 12 motion to dismiss, Rule 12(h)(1) tells us that the defense is entirely waived. But Rule 12(h)(2) provides a less severe sanction for failure to assert a defense under Rule 12(b)(6). If a failure-to-state-a-claim defense under Rule 12(b)(6) was not asserted in the first motion to dismiss under Rule 12, Rule 12(h)(2) tells us that it can be raised, but only in a pleading under Rule 7, in a post-answer motion under Rule 12(c), or at trial. *See, e.g., English v. Dyke*, 23 F.3d 1086, 1091 (6th Cir. 1994) (correctly describing the operation of the rule).

The Third and Tenth Circuits have read Rule 12 correctly, but have been very forgiving of a district court's failure to follow Rule 12(g)(2). *See Leyse v. Bank of Am. Nat. Ass'n*, 804 F.3d 316, 321–22 (3d Cir. 2015) ("So long as the district court accepts all of the allegations in the complaint as true, the result is the same as if the defendant had filed an answer admitting these allegations and then filed a Rule 12(c) motion for judgment on the pleadings, which Rule 12(h)(2)(B) expressly permits."); *Albers v. Bd. of Cty. Comm'rs of Jefferson Cty., Colo.*, 771 F.3d 697, 704 (10th Cir. 2014) ("[W]hether the district court dismissed the complaint based on a motion under Rule 12(b)(6) or rule 12(c) makes no difference for purposes of our review. Therefore, any procedural error that may have been been committed would be harmless and does not prevent us from reaching the merits of the district court's decision.").

We agree with the approach of the Third and Tenth Circuits. We read Rule 12(g)(2) in light of the general policy of the Federal Rules of Civil Procedure, expressed in Rule 1. That rule directs that the Federal Rules "be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. Denying late-filed Rule 12(b)(6) motions and relegating defendants to the three procedural avenues specified in Rule 12(h)(2) can produce unnecessary and costly delays, contrary to the direction of Rule 1.

District courts in this circuit and others are well aware of this. For example, as the late Judge Pfaelzer recently wrote:

> Rule 12(g) is designed to avoid repetitive

> motion practice, delay, and ambush tactics. If the Court were to evade the merits of Defendants' ... defenses here, Defendants would be required to file answers within 14 days of this Order. They would presumably assert [the same defenses] in those answers. Defendants would then file Rule 12(c) motions, the parties would repeat the briefing they have already undertaken, and the Court would have to address the same questions in several months. That is not the intended effect of Rule 12(g), and the result would be in contradiction of Rule 1's mandate[.]

Allstate Ins. Co. v. Countrywide Fin. Corp., 824 F.Supp.2d 1164, 1175 (C.D. Cal. 2011) (citations omitted); *see also Banko v. Apple, Inc.*, No. 13–02977 RS, 2013 WL 6623913, at *2 (N.D. Cal. Dec. 16, 2013) (internal quotations omitted) ("Although Rule 12(g) technically prohibits successive motions to dismiss that raise arguments that could have been made in a prior motion ... courts faced with a successive motion often exercise their discretion to consider the new arguments in the interests of judicial economy."); *Davidson v. Countrywide Home Loans, Inc.*, No. 09–CV–2694–IEG JMA, 2011 WL 1157569, at *4 (S.D. Cal. Mar. 29, 2011) (internal quotations omitted) ("Rule 12(g) applies to situations in which a party files successive motions under Rule 12 for the sole purpose of delay[.]"); *Doe v. White*, No. 08–1287, 2010 WL 323510, at *2 (C.D. Ill. Jan. 20, 2010) (citing the "substantial amount of case law which provides that successive Rule 12(b)(6) motions may be considered where they have not been filed for the purpose of delay, where entertaining the motion would expedite

the case, and where the motion would narrow the issues involved"). Moore's *Federal Practice* endorses this approach. *See* 2–12 Moore's Federal Practice—Civil § 12.23 ("[B]ecause [a 12(b)(6) defense] is so basic and was not waived, [a district] court might properly entertain a second motion if it were convinced it was not interposed for delay and that addressing it would expedite disposition of the case on the merits.").

Recognizing the practical wisdom of these district courts, and of the Third and Tenth Circuits, we conclude that, as a reviewing court, we should generally be forgiving of a district court's ruling on the merits of a late-filed Rule 12(b)(6) motion. With that in mind, we turn to the case now before us.

Apple's first two motions to dismiss under Rule 12(b)(7), directed to Complaints 1 and 2, were designed to force Plaintiffs to add ATTM as a necessary and indispensable party under Rule 19. These were appropriate motions, given that Count III alleged a conspiracy between Apple and ATTM to monopolize voice and data services, and given that Plaintiffs had sufficiently alleged Article III injury to make that claim. After Plaintiffs filed Complaint 3, which had been amended to recognize the success of Apple's motions under Rule 12(b)(7), Apple moved again to dismiss. It now moved for the first time to dismiss Counts I and II, relying on Rules 12(b)(1) and 12(b)(6). A Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, including for failure to allege injury sufficient for Article III standing, may be made at any time. *See* F. R. Civ. P. 12(b)(1) and 12(h)(3). Apple's earlier Rule 12 motions to dismiss thus in no way foreclosed its late-filed motion to dismiss Counts I and II for lack of Article III standing. The district court

granted Apple's Rule 12(b)(1) motion to dismiss. It refused to decide Apple's Rule 12(b)(6) motion to dismiss for lack of statutory standing on the ground that, in the absence of an Article III case or controversy, a ruling on the motion would be an advisory opinion.

Complaint 4 realleged Counts I and II, and finally alleged, for the first time, that Plaintiffs had purchased iPhone apps. That is, Complaint 4 finally alleged sufficient injury to confer Article III standing to support Counts I and II. Apple moved to dismiss for the fourth time, this time only under Rule 12(b)(6) for lack of statutory standing under *Illinois Brick*.

Apple's motions to dismiss for lack of standing under Rule 12(b)(6), made in its third and fourth motions to dismiss under Rule 12, may not have been late-filed within the meaning of Rule 12(g)(2). Indeed, there is an argument that Apple's motion to dismiss Complaint 3 under Rule 12(b)(6), made as part of its third Rule 12 motion to dismiss, was not late but premature. At that point, Plaintiffs had not alleged injury sufficient to confer subject matter jurisdiction over Counts I and II. For that reason, the district court properly refused to rule on Apple's Rule 12(b)(6) motion, holding that, in the absence of an allegation of Article III standing, any ruling would be advisory. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). The district court was willing to decide Apple's Rule 12(b)(6) motion to dismiss for lack of statutory standing only when Plaintiffs finally alleged, in Complaint 4, sufficient injury to confer Article III standing to bring the challenged counts.

Even if we assume arguendo that Apple's motion to dismiss under Rule 12(b)(6), made in its fourth Rule 12 motion, was late, any error by the district court in considering the motion on the merits was harmless. First, the four motions to dismiss, culminating in the motion to dismiss Complaint 4 under Rule 12(b)(6), do not appear to have been filed for any strategically abusive purpose. Apple promptly moved to dismiss each of Plaintiffs' four complaints. Apple's first two motions to dismiss were made on March 2 and April 16, 2012, immediately after the filing of Plaintiffs' first two complaints. Plaintiffs filed Complaint 3 on September 28, 2012. Apple moved to dismiss under Rules 12(b)(1) and 12(b)(6) on November 2, 2012. Plaintiffs filed Complaint 4 on September 5, 2013. Apple moved to dismiss under Rule 12(b)(6) on September 30, 2013. We recognize that Apple could have moved, along with its motion to dismiss for failure to join ATTM under Rule 12(b)(7), to dismiss Counts I and II for lack of subject matter jurisdiction under Rule 12(b)(1). If that motion had been made and granted, Plaintiffs would likely have amended their complaint earlier to allege purchases of iPhone apps. But we see no harm to Plaintiffs caused by Apple's delay in making its Rule 12(b)(1) motion. Second, resort to any of the three default alternatives specified in Rule 12(h)(2)—a pleading under Rule 7(a), a post-answer motion to dismiss on the pleadings under Rule 12(c), or a defense asserted at trial—would have substantially delayed resolution of the *Illinois Brick* statutory standing question, and would have done so for no apparent purpose. The district court's decision on the merits of Apple's Rule 12(b)(6) motion materially expedited the district court's disposition of the case, which was a benefit to both parties.

We therefore conclude that any error committed by the district court in ruling on Apple's motion to dismiss under Rule 12(b)(6) for lack of statutory standing under *Illinois Brick*, if indeed there was error, was harmless. We now turn to the merits of the district court's decision.

B. Standing Under *Illinois Brick*

1. The Direct–Purchaser Rule

Under § 4 of the Clayton Act, "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue ... and shall recover threefold the damages by him sustained[.]" 15 U.S.C. § 15(a). Notwithstanding the statutory term "any person," the Supreme Court has limited those who may sue for antitrust damages. The general rule is that only "the overcharged direct purchaser, and not others in the chain of manufacture or distribution," has standing to sue. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 729, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977).

The rule originated in *Hanover Shoe v. United Shoe Machinery Co.*, 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968). Hanover, a shoe manufacturer, alleged that the United Shoe Machinery Corporation had used its monopoly over shoe-manufacturing machinery to lease machines to Hanover at supracompetitive rates. *Id.* at 483–84, 88 S.Ct. 2224. United argued that Hanover had no legally cognizable injury under the antitrust laws because it had passed any illegal overcharge on to its customers. *Id.* at 491, 88 S.Ct. 2224. The Court rejected United's "defensive" use of the pass-on theory. For purposes of antitrust damages, the Court held, the direct purchaser is injured by the full amount of the overcharge irrespective of who

ultimately bears the cost of that injury. *Id.* at 494, 88 S.Ct. 2224.

The Court gave two reasons for its holding. First, the dollar figures necessary to demonstrate that an intermediary has avoided economic injury by passing an overcharge onto his customers were, the Court found, "virtually unascertainable." *Id.* at 493, 88 S.Ct. 2224. A litigant would need to show, among other things, that the intermediary raised the price of his product as a result of the illegal overcharge; that the higher price charged by the intermediary did not affect the intermediary's profits by reducing the volume of sales; and that the intermediary could not or would not have raised its price absent the overcharge. The challenges to making such a showing, the Court observed, would "normally prove insurmountable." *Id.* Second, if an antitrust violator were permitted to defend against suit by showing that the intermediary passed the alleged overcharge onto its customers, those customers would logically be entitled to damages for any portion of the overcharge they paid. In many cases, however, there would be a large number of customers, each of whom would have "only a tiny stake in a lawsuit," and who, in the view of the Court, would thus have "little interest in attempting a class action." *Id.* at 494, 88 S.Ct. 2224. As a result, according to the Court, antitrust violators would "retain the fruits of their illegality because no one ... would bring suit against them." *Id.*

Nine years after *Hanover Shoe*, the Supreme Court rejected an attempt to use the pass-on theory "offensively." In *Illinois Brick*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977), the State of Illinois sued a concrete block manufacturer for allegedly fixing the

price of concrete blocks. The manufacturer had sold the blocks to masonry contractors who had used the blocks to build masonry structures. The masonry contractors sold the structures to general contractors who put the structures in buildings they sold to the State. The State alleged that the contractors had passed on the manufacturer's illegal overcharge at both stages of the distribution chain, driving up the State's costs by $3 million.

The Supreme Court refused to recognize the passed-on overcharges as a basis for antitrust standing. As in *Hanover Shoe*, the challenges of tracing the effects of an overcharge at each stage of a distribution chain were, in the Court's view, insurmountable. Even if indirect purchasers could meet these challenges, sorting out the complicated variables would clog the courts with protracted and expensive litigation. *Id.* at 732, 97 S.Ct. 2061. And even then problems of administrability and enforcement would remain. Allowing an indirect purchaser to sue for whatever portion of an overcharge it was assessed would either "create a serious risk of multiple liability for defendants," *id.* at 730, 97 S.Ct. 2061, or reduce the effectiveness of antitrust laws by diluting the share of damages better-situated direct purchasers might secure by bringing suit. *Id.* at 731–35, 97 S.Ct. 2061.

The Supreme Court has reaffirmed the *Hanover Shoe/Illinois Brick* rule in a case where the practical considerations that gave rise to the rule were not nearly as compelling as in the two foundation cases. In *Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199, 110 S.Ct. 2807, 111 L.Ed.2d 169 (1990), customers of public utilities sued natural gas producers for alleged violations of Section 4 of the Clayton Act. Plaintiffs

conceded that they were direct purchasers from the public utilities and indirect purchasers from the producers. But they argued that the direct purchasers, because they were regulated public utilities, had the incentive and ability to build into their pricing structure their entire cost of purchasing natural gas. *Id.* at 205, 110 S.Ct. 2807. On the other side of the coin, because they were public utilities, they had the obligation to pass on the entirety of any cost savings resulting from a reduced purchasing cost. *Id.* at 212, 110 S.Ct. 2807. Therefore, the complications in determining the amount of illegal overcharge that had been, or could be, passed on that had so concerned the Court in *Hanover Shoe* and *Illinois Brick* were largely absent. The Court nonetheless applied the direct/indirect purchaser rule, holding that "[i]n the distribution chain," the customers were "not the immediate buyers from the alleged antitrust violators." *UtiliCorp*, 497 U.S. at 207, 110 S.Ct. 2807.

The transactions in *Hanover Shoe* and *Illinois Brick* have the same structure. In both cases, a monopolizing or price-fixing manufacturer sold or leased a product to an intermediate manufacturer at a supracompetitive price. The intermediate manufacturer (in *Illinois Brick*, two intermediate manufacturers) then used that product to create another product, which was ultimately sold to the consumer. The details in *UtiliCorp* are different, but the basic structure is the same. In *UtiliCorp*, a monopolizing producer sold a product to a distributor at an allegedly supracompetitive price. The distributor then sold the product to the consumer. In all three cases, the consumer was an indirect purchaser from the manufacturer or producer who sold or leased the

product to the intermediary. The consumer was a direct purchaser from the intermediate manufacturer (*Hanover Shoe* and *Illinois Brick*) or from the distributor (*UtiliCorp*). The consumer did not have standing to sue the manufacturer or producer, but did have standing to sue the intermediary, whether the intermediate manufacturer or the distributor.

2. Plaintiffs Are Direct Purchasers

The question before us is whether Plaintiffs purchased their iPhone apps directly from the app developers, or directly from Apple. Stated otherwise, the question is whether Apple is a manufacturer or producer, or whether it is a distributor. Under *Hanover Shoe*, *Illinois Brick*, and *UtiliCorp*, if Apple is a manufacturer or producer from whom Plaintiffs purchased indirectly, Plaintiffs do not have standing. But if Apple is a distributor from whom Plaintiffs purchased directly, Plaintiffs do have standing.

We do not write on a clean slate in this circuit. In *Delaware Valley Surgical Supply, Inc. v. Johnson & Johnson*, 523 F.3d 1116 (9th Cir. 2008), plaintiff Bamberg County Memorial Hospital & Nursing Center ("Bamberg") brought suit against Johnson & Johnson ("J & J") alleging that J & J "impermissibly leveraged its monopoly power in sutures to create a monopoly" in the market for endomechanical products. *Id.* at 1118. Bamberg did not purchase medical supplies directly from J & J. Instead, a group purchasing organization ("GPO"), of which Bamberg was a member, negotiated purchasing contracts with J & J and a distributor, Owens & Minor ("O & M"). J & J and O & M, in turn, had a distributorship agreement specifying that O & M would pay J & J the price negotiated by the GPO. Bamberg would purchase from O & M, paying O & M

this price plus a set percentage markup. Pursuant to this agreement, J & J supplied products to the distributor, O & M, which in turn sold and delivered the products to Bamberg, at a price equal to the cost O & M paid for the products plus the set markup determined by a contract between O & M and Bamberg. *Id.* at 1119.

Applying the "straightforward," "bright line" rule of *Illinois Brick*, we held in *Delaware Valley* that Bamberg was an indirect purchaser from J & J, the manufacturer, and a direct purchaser from O & M, the distributor. *Id.* at 1122, 1120. That Bamberg and J & J had a contract setting the wholesale price of the products, and that the price Bamberg paid O & M was "set, in part, by an agreement negotiated . . . on behalf of Bamberg" with J & J were not determinative. *Id.* at 1122. The determinative fact was that O & M was a distributor who sold the products directly to Bamberg. Because Bamberg bought directly from O & M, the distributor, it lacked standing to sue J & J, the manufacturer. The necessary corollary of *Delaware Valley* is that Bamberg would have had standing to sue O & M, the distributor.

The Eighth Circuit has considered a transaction closely resembling the transaction in the case before us. In *Campos v. Ticketmaster Corp.*, 140 F.3d 1166 (8th Cir. 1998), plaintiffs alleged that Ticketmaster used its monopolistic control over concert ticket distribution services to charge supracompetitive fees for those services. The majority in *Ticketmaster* held that a party's status as a "direct" or "indirect" purchaser turned on whether "an antecedent transaction between the monopolist and another, independent purchaser" absorbed or passed on all or

part of the monopoly overcharge. *Id.* at 1169. Plaintiffs bought concert tickets directly from Ticketmaster, but the majority nevertheless concluded that plaintiffs were indirect purchasers who lacked standing under *Illinois Brick*. *Id.* at 1171. Using an analysis keyed to the "antecedent transaction," the majority concluded that the ticket buyers were indirect purchasers.

We disagree with the majority's analysis in *Ticketmaster*. As Judge Morris Arnold pointed out in dissent, the majority's "antecedent transaction" analysis has no basis in Supreme Court precedent. *Id.* at 1174 (M. Arnold, J., dissenting). *Illinois Brick* held that where plaintiffs are in a "direct vertical chain of transactions" and an intermediary "pass[es] on" monopolistic overcharges originating further up the chain, subsequent buyers lack standing. *Id.* (internal quotation marks omitted). In *Ticketmaster*, "[t]he monopoly product at issue ... is ticket distribution services, not tickets." *Id.* The distributor who "supplies the product directly to" plaintiffs, rather than the producer of the product, is the appropriate defendant in an antitrust suit. *Id.*

Apple argues that it does not sell apps but rather sells "software distribution services to developers." In Apple's view, because it sells distribution services to app developers, it cannot simultaneously be a distributor of apps to app purchasers. Apple analogizes its role to the role of an owner of a shopping mall that "leases physical space to various stores." Apple's analogy is unconvincing. In the case before us, third-party developers of iPhone apps do not have their own "stores." Indeed, part of the anti-competitive behavior alleged by Plaintiffs is that, far from allowing iPhone

app developers to sell through their own "stores," Apple specifically forbids them to do so, instead requiring them to sell iPhone apps only through Apple's App Store.

We do not address the question whether Apple sells distribution services to app developers within the meaning of *Illinois Brick*. If it did, this would necessarily imply that the developers, as direct purchasers of those services, could bring an antitrust suit against Apple. But whether app developers are direct purchasers of distribution services from Apple in the sense of *Illinois Brick* makes no difference to our analysis in the case now before us.

We do not rest our analysis on the fact that Plaintiffs pay the App Store, which then forwards the payment to the app developers, less Apple's thirty percent commission. Whether a purchase is direct or indirect does not turn on the formalities of payment or bookkeeping arrangements. *See Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1146 (9th Cir. 2003). If Plaintiffs were direct purchasers from Apple solely because Apple collected their payments, Apple could escape anti-trust liability simply by tinkering with the order in which digital banking data zips through cyberspace during a sales transaction.

Nor do we rest our analysis on the form of the payment Apple receives in return for distributing iPhone apps. Apple does not take ownership of the apps and then sell them to buyers after adding a markup of thirty percent. Rather, it sells the apps and adds a thirty percent commission. But the distinction between a markup and a commission is immaterial. The key to the analysis is the function Apple serves

rather than the manner in which it receives compensation for performing that function.

Nor, finally, do we rest our analysis on who determines the ultimate price paid by the buyer of an iPhone app. In the case before us, the price is determined as a practical matter by the app developer who sets a price, to which Apple's thirty percent commission is added automatically. Our opinion in *Delaware Valley* makes clear that this does not make app purchasers direct buyers from the app developers. In *Delaware Valley*, the price paid by the distributor, O & M, to the manufacturer, J & J, was determined through a negotiation between J & J and a GPO of which Bamberg was a member. Despite the fact that Bamberg, through its GPO, had a say in the wholesale price charged by J & J to O & M, to which the distributor added its predetermined markup, we held that Bamberg was a direct purchaser from O & M. Here, the case is even stronger in favor of Plaintiffs. Unlike Bamberg, Plaintiffs have no say whatsoever in determining the price set by the app developer to which the distributor adds its predetermined commission.

Instead, we rest our analysis, as compelled by *Hanover Shoe*, *Illinois Brick*, *UtiliCorp*, and *Delaware Valley*, on the fundamental distinction between a manufacturer or producer, on the one hand, and a distributor, on the other. Apple is a distributor of the iPhone apps, selling them directly to purchasers through its App Store. Because Apple is a distributor, Plaintiffs have standing under *Illinois Brick* to sue Apple for allegedly monopolizing and attempting to monopolize the sale of iPhone apps.

Conclusion

We conclude that any error, if indeed there was error, in the district court's consideration of the merits of Apple's Rule 12(b)(6) motion to dismiss for lack of statutory standing was harmless. We conclude further that Plaintiffs are direct purchasers of iPhone apps from Apple under *Illinois Brick* and that they therefore have standing to sue. The district court dismissed Plaintiffs' complaint on the ground that they lacked statutory standing under *Illinois Brick*. We therefore reverse and remand for further proceedings.

REVERSED and REMANDED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE APPLE IPHONE ANTITRUST LITIGATION	Case No.: 11-cv-06714-YGR **ORDER GRANTING APPLE'S MOTION TO DISMISS SECOND AMENDED COMPLAINT WITH PREJUDICE**

The thrust of Plaintiffs' Second Amended Complaint ("SAC") is that Apple has engaged in antitrust conduct by collecting thirty percent of the price of iPhone applications ("Apps") from independent software developers for Apps sold in Apple's App Store. Notably, the SAC is devoid of allegations regarding any attempt on the part of Apple to set fixed prices for Apps, to have acted in concert with the independent software developers to fix said prices, or to otherwise control the independent software developers. Instead, Plaintiffs attempt to plead that they are aggrieved direct purchasers by arguing that the thirty-percent portion obtained by Apple is a direct, fixed cost to consumers who are "first" in the chain to purchase the Apps. In so arguing, Plaintiffs attempt to avoid being categorized as indirect purchasers who pay Apple a fee via a pass-through because in such a situation they would lack standing to allege antitrust claims under *Illinois Brick Co. v. Illinois*. Pending before the Court is Defendant

Apple's Motion to Dismiss Plaintiffs' Second Amended Complaint ("SAC"). (Dkt. No. 115.)[1]

Having carefully considered the papers submitted and the pleadings in this action, the arguments of counsel, and for the reasons set forth below, the Court hereby **GRANTS** Apple's Motion to Dismiss **WITHOUT LEAVE TO AMEND.**

I. BACKGROUND[2]

Named Plaintiffs Stephen Schwartz, Edward Hayter, Eric Terrell, and Robert Pepper filed the SAC on their behalf and on behalf of a class of:

> All persons in the United States, exclusive of Apple and its employees, agents and affiliates, and the Court and its employees, who purchased an iPhone application or application license from Apple for use on an iPhone at any time from December 29, 2007 through the present.

(SAC ¶ 54.) Plaintiffs allege one claim for unlawful monopolization of an aftermarket for iPhone applications in violation of section 2 of the Sherman Act and a second claim for attempted monopolization of the same aftermarket. The aftermarket of iPhone

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[1] *See also* Plaintiffs' Opposition to Defendant Apple's Motion to Dismiss Plaintiffs' Second Amended Consolidated Complaint (Dkt. No. 116) and Apple's Reply in Support of Motion to Dismiss Plaintiffs' Second Amended Complaint (Dkt. No. 118). The Court held oral argument on November 5, 2013.

[2] A detailed procedural and factual background of this action can be found in this Court's Order Granting Apple's Motion to Dismiss Amended Consolidated Complaint ("Prior Order"). (Dkt. No. 108.) The background section of this Order will focus solely on the allegations in Plaintiffs' SAC.

applications "includes the market for distributing software applications that can be downloaded on the iPhone for managing such functions as ringtones, instant messaging, photographic and video capability, gaming and other entertainment, Internet applications, and any other downloadable software-driven functions." (*Id.* ¶ 68.)

In terms of this alleged aftermarket, Plaintiffs contend that Apple has instituted, first, "an anticompetitive scheme to monopolize the aftermarket for iPhone applications in order to control and derive supracompetitive profits from the distribution of iPhone apps worldwide." (SAC ¶ 3.) Second, Plaintiffs claim that in implementing a closed iPhone operating system, known as an "iOS," the App Store is the only store in the world for iPhone users to buy Apps for their iPhones. (*Id.* ¶¶ 1, 4.) Thus, Apple has "cornered 100% of the distribution market for iPhone applications" and effectively "foreclosed iPhone customers from buying software from any source other than Apple."[3] (*Id.* ¶¶ 3, 7.)

In this market environment, Plaintiffs allege Apple charges and collects a "supracompetitive 30% fee from

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[3] In particular, Apple modified the "open" operating system used in Apple desktop and laptop computers (OS X) to a "closed" iOS for the iPhone, which included security measures and program locks designed to prevent iPhone users from installing and running Apps that were not sold or approved by Apple. (SAC ¶ 30.) Plaintiffs contend that Apple's closed system was not intended to protect its proprietary right to own, sell, or license iOS, but rather, it was closed "for the specific purpose ... of foreclosing competition from other potential iPhone software manufacturers and distributors so that Apple could monopolize and derive monopoly profits from the iPhone apps aftermarket." (*Id.* ¶ 31.)

iPhone consumers" for each App purchased. (SAC ¶ 4; *see also id.* ¶ 6 (referring to the fee as a "30% mark-up"), ¶ 7 ("Apple then forced those foreclosed customers to pay Apple a 30% fee for each and every iPhone app they buy"), ¶ 8 ("charging customers an extra 30% for every app"), ¶ 40 ("30% commission") & ¶ 48 ("30% profit margin").)[4] Plaintiffs concede "the majority of iPhone apps are now free," but also allege that "iPhone consumers have been overcharged hundreds of millions of dollars for paid apps." (*Id.* ¶ 9 (also alleging that Apple offers more than 850,000 Apps and iPhone customers worldwide have downloaded more than 50 billion Apps since July 2008).)

With regard to the relationship between Apple and the independent software developers creating Apps for iPhones, the SAC identifies three notable characteristics. First, "Apple always conditioned its 'approval' of such apps on the third party's agreement to give Apple *a share of* the third party's sales proceeds"—namely, 30% identified as both a "commission" and a "mark-up." (*Id.* ¶¶ 32 (emphasis supplied), 40, 41.) Second, Apple released a "software development kit" to "enable[e] independent software developers to design applications for use on the iPhone" for an annual price of $99. (*Id.* ¶ 38.) Third, Plaintiffs allege Apple "takes its 30% commission off the top and then remits the balance, or 70% of the purchase price, to the developer. Apple sells the apps (or, more recently, licenses for the apps) directly to the customer, collects the entire purchase price, and pays the developers after the sale. The developers at no

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[4] Plaintiffs allege that Apple did not disclose to them that Apps could only be purchased from Apple and by "paying Apple's 30% fee." (SAC ¶ 14.)

time directly sell the apps or licenses to iPhone customers or collect payments from the customers." (*Id.* ¶ 41.)

Based on these allegations, Plaintiffs summarily conclude that they have been injured by Apple's conduct "because they paid more for their iPhone apps than they would have paid in a competitive market."[5] (SAC ¶ 45.) Plaintiffs proffer that Apple's 30% fee is an "obvious" monopoly price because the developers' flat $99 annual fee "covers most or all of Apple's costs" in reviewing developers' apps and maintaining the App Store. (*Id.* ¶ 48.) Based on this "obvious" conclusion, Plaintiffs simply equate the 30% fee as "virtually pure profit for Apple." (*Id.*) Plaintiffs then suggest that if developers could sell apps independently, they and discount volume retailers would sell them for "far less than a 30% profit." (*Id.*)

II. DISCUSSION

A. Standard Under Federal Rule of Civil Procedure 12(b)(6)

A complaint may be dismissed against a defendant for failure to state a claim upon which relief may be granted against that defendant. Fed. R. Civ. P. 12(b)(6). Dismissal may be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699

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[5] Plaintiffs also identify as injuries (i) the deprivation of the "freedom of choosing between Apple's App Store and lower cost market alternatives that would have been available had Apple not monopolized the market" and (ii) "a reduction in the output and supply of iPhone apps, which would have been more abundantly available in a competitive market" if not for Apple's monopoly pricing. (SAC ¶ 45.)

(9th Cir. 1990); *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 533–34 (9th Cir. 1984). For purposes of evaluating a motion to dismiss, the court "must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the nonmoving party." *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). Any existing ambiguities must be resolved in favor of the pleading. *Walling v. Beverly Enters.*, 476 F.2d 393, 396 (9th Cir. 1973).

Mere conclusions couched in factual allegations are not sufficient to state a cause of action. *Papasan v. Allain*, 478 U.S. 265, 286 (1986); *see also McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988). As set forth in the seminal antitrust case, *Bell Atlantic. Corp. v. Twombly*, a complaint must plead "enough facts to state a claim [for] relief that is plausible on its face." 550 U.S. 544, 570 (2007). A claim is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Thus, "for a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009). Courts may dismiss a case without leave to amend if the plaintiff is unable to cure the defect by amendment. *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000).

Apple's Motion to Dismiss sets forth two primary arguments: first, Plaintiffs lack antitrust standing; and second, Plaintiffs fail to state a claim upon which relief can be granted because they do not allege a relevant antitrust market nor any anticompetitive conduct. As

a threshold matter, the Court begins with the issue of antitrust standing.

B. Antitrust Standing

1. Legal Framework of the *Illinois Brick* Doctrine

In *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), the Supreme Court held that "only direct purchasers have standing under section 4 of the Clayton Act[6] to seek damages for antitrust violations." *Delaware Valley*, 523 F.3d at 1120–21 (citing *Illinois Brick*, 431 U.S. at 735). Under *Illinois Brick*, "only the first party in the chain of distribution to purchase a price-fixed product has standing to sue." *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 911 F. Supp. 2d 857, 864 (N.D. Cal. 2012) ("*In re CRT* "); *In re ATM Fee Antitrust Litig.*, 686 F.3d 741, 748 (9th Cir. 2012) (a "direct purchaser has 'been injured in its business as required by [§] 4' even though it passes on 'claimed illegal overcharge[s] to' its customers") (quoting *Illinois Brick*, 431 U.S. at 724). Indirect purchasers are precluded from suing "based on unlawful overcharges passed on to them by intermediaries in the distribution chain who purchased directly from the alleged antitrust violator." *In re CRT*, 911 F. Supp. 2d at 864 (citations

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[6] Section 4 of the Clayton Act, 15 U.S.C. section 15(a), provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue ... and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." "The Supreme Court has interpreted th[is] section narrowly, thereby constraining the class of parties that have statutory standing to recover damages through antitrust suits." *Delaware Valley Surgical Supply Inc. v. Johnson & Johnson*, 523 F.3d 1116, 1120 (9th Cir. 2008).

omitted). While *Illinois Brick* prevented offensive use of a "pass-through" theory by indirect purchasers, it also prohibited defendants from using a pass-on theory to challenge the standing of direct purchasers. *In re CRT*, 911 F. Supp. 2d at 864; *In re ATM Fee*, 686 F.3d at 748.

Standing does not depend exclusively on a purchaser's status as direct or indirect. Standing of indirect purchasers can also be conferred if any of the recognized exceptions to the *Illinois Brick* doctrine applies. *In re CRT*, 911 F. Supp. 2d at 865. In the Ninth Circuit, three exceptions exist which would grant standing, namely when an indirect purchaser can establish, one, "a preexisting cost-plus contract with the direct purchaser" or, two, "a price-fixing conspiracy between the manufacturer and the middleman" where the conspiracy "fix[es] the price paid" by the indirect purchasers. The third exception arises "when customers of the direct purchaser own or control [said] direct purchaser" or "when a conspiring seller owns or controls the direct purchaser." *In re ATM Fee*, 686 F.3d at 749 (citations omitted).[7] There, the indirect purchaser is, in effect, the first non-controlled purchaser.

Here, in its Prior Order, the Court dismissed the prior complaint based on lack of Article III standing and granted leave to amend the complaint to address standing issues. Noting that Plaintiffs bear the burden of alleging the theory and facts upon which they are

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[7] The Ninth Circuit also recognized a potential fourth exception that "indirect purchasers can sue for damages if there is no realistic possibility that the direct purchaser will sue." *In re ATM Fee*, 686 F.3d at 749 (noting, however, a lack of clarity regarding whether the exception exists).

proceeding, the Court observed that the allegations in the prior complaint contradicted the arguments made in Plaintiffs' opposition to the prior motion to dismiss. The Court further stated the following:

> The *Apple II* Amended Complaint does not allege a "supracompetitive" or "fixed" price, but rather a mark-up. Plaintiffs allege throughout the Amended Complaint that Apple's conduct has "unlawfully stifled competition, reduced output and consumer choice, and artificially increased prices in the aftermarkets for ... iPhone software applications." (*Apple II* Amended Complaint ¶ 7; id. ¶¶ 11 ("increased price for those applications"), 91 & 97.) Nowhere do Plaintiffs explain how Apple's conduct results in increased "prices" or how said prices were paid. In their Opposition, Plaintiffs confirm that they challenge "only the 30% fee" (Opp. at 13) but also, for the first time, argue that "iPhone consumers were forced *to pay Apple* a 30% fee on top of the cost for the apps" (Opp. at 11 (emphasis in original)). Because the Court's analysis focuses on the actual allegations of the Amended Complaint, and those allegations do not sufficiently identify the basis upon which Plaintiffs are proceeding, the Court declines to issue an advisory opinion analyzing *Illinois Brick* as relevant here.

(Prior Order at 19–20 (footnote omitted) (alteration in original).)

The Prior Order identified two primary areas lacking clarity: (i) the nature of how the 30% fee was paid—whether it was paid directly or through a pass-

through; and (ii) how Apple's alleged conduct resulted in an increased (or marked-up) price and, if so, how it was paid. Plaintiffs' prior briefing stood in stark contrast to the allegations of the prior complaint, which claimed that "Apple collects 30% of the sale of each application, with the developer receiving the remaining 70%." (Dkt. No. 81 ¶ 5.)

2. Revised Allegations Regarding Antitrust Standing

Plaintiffs contend that the SAC supports two different theories upon which they establish standing as direct purchasers: (1) consumers pay the price of the entire App to Apple directly; and (2) consumers are the only purchasers of Apps and therefore cannot be deemed indirect purchasers. Plaintiffs argue they are straightforward direct purchasers because "Apple *itself* sells every app *directly* to iPhone consumers, Apple *itself* imposes and *directly* collects from iPhone consumers every 30% fee it charges, and Apple's 30% fee is a supracompetitive price that exceeds the prices consumers otherwise would pay for apps had Apple not unlawfully monopolized the iPhone apps aftermarket." (Opposition at 1; *see* SAC ¶ 41.) Said differently, Plaintiffs claim the price of an App has two components: "*the developers' price plus Apple's 30% mark-up*" or Apple's 30% fee "on top of the cost for the apps." (Opposition at 7 (underlined emphasis supplied).) Thus, Plaintiffs argue Apple, as the alleged antitrust violator, "imposes the illegal 30% fee on top of the price of the apps, Plaintiffs purchase the illegal-fee laden apps *directly from Apple*, and Plaintiffs pay the illegal 30% *directly to Apple*, which keeps the entire 30% fee *for itself*." (Opposition at 9 (citing SAC ¶¶ 40–41).) Plaintiffs also point out that only they—the

consumers—purchased the apps. Thus, as they are the *only party* in the chain that buys the "price-fixed" product, Plaintiffs conclude they are straightforward direct purchasers. (Opposition at 9.)

Apple disagrees. Apple concedes that Plaintiffs allege that (i) there is a 30% fee, (ii) the fee is Apple's, (iii) Apple collects said fee, and (iv) consumers pay the fee for every App they purchase. (Motion at 7 (citing SAC ¶¶ 4, 6, 7, 8, 14 & 41).) However, Apple contends that its *collection* of the entire price of the App *from consumers* is irrelevant to the standing analysis: "[t]he fact of a pass-through, rather than the mechanism by which the pass-through is collected, determines indirect purchaser status." (Motion at 8.) Put another way, if the developers first bear Apple's fee, then Plaintiffs do not have standing to pursue their claims regardless of whether the actual collection of the 30% happens directly from consumers to Apple.[8]

Apple emphasizes that the allegations in the SAC support their proposition and explain the interplay between it and the developers vis-à-vis the consumer. Specifically, Apple notes that Plaintiffs allege (i) "Apple always conditioned its 'approval' of such apps on the third party's agreement to give Apple *a share of the third party's sales proceeds*," (ii) that "the full

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[8] Apple emphasizes that Plaintiffs did not amend the complaint to add any allegations that the 30% fee is on top of the cost for the apps; nor did Plaintiffs explicitly explain, as directed by the Court, how the 30% fee is paid by consumers—whether "as a pass-through from developers, or as an entirely separate charge Apple adds 'on top of' the developers' App price when the consumer makes a purchase." (Motion at 8.) Instead, Plaintiffs still acknowledge that Apple earns a commission from the developers, which is "at worst" passed on to Plaintiffs, making their injury indirect. (*Id.* at 1 (citing SAC ¶¶ 40, 41).)

purchase price [ ] includ[es] Apple's 30% commission," which is paid directly to Apple, and (iii) once paid, "Apple takes its 30% commission off the top and then remits the balance, or 70% of the purchase price, to the developer." (SAC ¶¶ 32 (emphasis supplied), 41.) According to Apple, these allegations describe a distribution cost or commission imposed on consumers, which renders them indirect purchasers under *Illinois Brick* because the 30% fee is charged to developers in the first instance and that cost is passed-through to consumers.

3. Analysis

The allegations in the SAC essentially pose the question of whether consumers have standing to challenge the 30% received by Apple for each App sold from an independent software developer. Plaintiffs cast themselves as direct purchasers while Apple argues that they are indirect purchasers.

In re ATM Fee is instructive, and relied upon by both parties. In that case, plaintiff–ATM cardholders alleged that large banks had conspired with the STAR ATM network (which facilitated connections between ATM owners and card-issuing banks) in order to fix a fee that the card-issuing bank paid to an ATM owner when certain transactions were routed over the network. *In re ATM Fee Antitrust Litig.*, No. C 04-02676 CRB, 2010 WL 3701912, at *2 (N.D. Cal. Sept. 16, 2010), *aff'd*, 686 F.3d 741 (9th Cir. 2012) (district court's Order Granting Defendants' Motion for Summary Judgment). Specifically, ATM cardholders challenged fees associated with use of ATMs not owned by their card-issuing bank, also known as a "foreign" ATM. 686 F.3d at 744–45. When a cardholder used a foreign ATM, four fees were generated: two paid by the

cardholders and two paid by the card-issuing bank. The fee disputed by plaintiffs was called an "interchange fee" and was paid by the card-issuing bank to the foreign ATM owner. *Id.* at 745. The plaintiffs alleged that the defendants engaged in horizontal price fixing by colluding to fix the price of this "interchange fee," which was then passed-on to the plaintiffs as part of the foreign ATM fee paid by cardholders to the card-issuing bank. *Id.* at 746. As framed by the district court, plaintiffs alleged that "[a]s a result of th[e] alleged 'price fix,' interchange fees [we]re . . . higher than they would otherwise be." 2010 WL 3701912, at *2.

There, the district court observed that plaintiffs *did not allege* that defendants "conspired to illegally fix the foreign ATM fee that [p]laintiffs pay to their bank when they use a foreign ATM." 686 F.3d at 746 (citing district court order). Rather, plaintiffs' complaint was that *their banks paid* an unlawfully-inflated interchange fee, which the banks then passed-on to them through the foreign ATM fee. *Id.* The district court held that because the interchange fee was not directly paid by the ATM cardholder-plaintiffs, they lacked standing to sue under *Illinois Brick*. *Id.* at 750.

The Ninth Circuit affirmed and analyzed the meaning of "fixing" a price.[9] 683 F.3d at 752–53. The Court agreed that "in the *Illinois Brick* context, fixing a price sets the price directly paid, not a price latter [*sic*] passed-on as part of the price at issue." *Id.* at 753. The Court rejected plaintiffs' argument which

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[9] As part of the Ninth Circuit's analysis, the court also examined the co-conspirator exception to *Illinois Brick* to determine whether plaintiffs had standing despite being an indirect purchaser. That exception does not apply here.

attempted to equate price fixing with "conspiring to set a price for the purpose and effect of raising the price at issue," and which would thereby transform the ATM cardholders into direct purchasers. *Id.* at 753. Ultimately, the Court held that "the price paid by plaintiffs must be the price set (not merely 'fixed' in some broad sense) for plaintiffs to be a direct purchaser under the narrowly defined injury requirement of § 4 of the Clayton Act." *Id.* at 754.

Here, at best, Plaintiffs allege that the ultimate price paid by them is somehow "fixed" across-the-board at a level 30% higher than it would otherwise be if not for Apple's conduct. The Court finds that under *In re ATM Fee*, the alleged conduct does not equate to price fixing. Despite Plaintiffs' efforts, the SAC is fairly read to complain about a fee created by agreement and borne *by the developers* to pay Apple 30% from their own proceeds—an amount which is passed-on to the consumers as part of the purchase price. Plaintiffs attempt to recast themselves as the sole purchasers of the Apps because Apple collects the entire purchase price is unavailing. To find otherwise would require the Court to ignore the other allegations in the SAC, which identify the developers' obligation to pay or share the thirty percent with Apple. Consequently, the Court finds the SAC does not allege facts from which Plaintiffs can be classified as direct purchasers.

In terms of an analysis of whether Plaintiffs' SAC demonstrates standing for indirect purchasers, the facts required to fall into one of the exceptions under the *Illinois Brick* doctrine are missing. Despite the Court's instruction to do so if they could, Plaintiffs do not allege in the SAC any price "fixed" by Apple. To

the extent that Plaintiffs intimate that developers would necessarily charge only 70% of the purchase price if not for Apple, such conclusion requires the Court to speculate into developers' pricing structure, their costs, ability to find a distribution chain, and/or desired profits or rates of return. Simply put, the Court cannot assume, as Plaintiffs do, that developers charging 99 cents for an App would necessarily have charged 70%, or 69 cents, if not for the agreement with Apple to pay them 30% of the purchase price. Further, the SAC lacks allegations of a conspiracy of any kind.

For the reasons set forth above, the Court finds that the 30% figure for which Plaintiffs complain is not a fixed fee, but a cost passed-on to consumers by independent software developers. As such, any injury to Plaintiffs is an indirect effect resulting from the software developers' own costs. Given that none of the exceptions to the *Illinois Brick* doctrine apply, Plaintiffs are barred from bringing claims because they are indirect purchasers. Having found that Plaintiffs lack antitrust standing, the Court declines to address Apple's further arguments regarding Plaintiffs' failure to state their antitrust claims.

III. CONCLUSION

For the foregoing reasons, Apple's Motion to Dismiss Plaintiffs' Second Amended Complaint is **GRANTED WITH PREJUDICE.**

This Order terminates Dkt. No. 115.

IT IS SO ORDERED.

Dated: December 2, 2013 s/ Yvonne Gonzalez Rogers

Yvonne Gonzalez Rogers
UNITED STATES
DISTRICT COURT JUDGE

FILED
MAY 4, 2017
MOLLY C. DWYER,
CLERK
U.S. COURT OF
APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: APPLE IPHONE ANTITRUST LITIGATION, ROBERT PEPPER; STEPHEN H. SCHWARTZ; EDWARD W. HAYTER; ERIC TERRELL, Plaintiffs-Appellants, v. APPLE, Defendant-Appellee.	No. 14-15000 D.C. No. 4:11-cv-06714-YGR Northern District of California, Oakland ORDER

Before: TASHIMA and W. FLETCHER, Circuit Judges, and GETTLEMAN,* District Judge.

The panel has voted unanimously to deny the petition for rehearing. Judge Fletcher has voted to

* The Honorable Robert W. Gettleman, United States District Judge for the Northern District of Illinois, sitting by designation.

deny the petition for rehearing en banc, and Judges Tashima and Gettleman so recommend.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc, filed January 26, 2017, are **DENIED**.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF CALIFORNIA
OAKLAND DIVISION

In re Apple iPhone Antitrust Litigation	Case No.: C 11-06714-YGR
	SECOND AMENDED CONSOLIDATED CLASS ACTION COMPLAINT
	DEMAND FOR JURY TRIAL

Plaintiffs Stephen H. Schwartz, Edward W. Hayter, Eric Terrell, and Robert Pepper ("Plaintiffs"), for their class action complaint, allege upon personal knowledge as to themselves and their own actions, and upon information and belief, including the investigation of counsel, as follows:

NATURE OF ACTION

1. This is an antitrust class action pursuant to Section 2 of the Sherman Antitrust Act of 1890, 15 U.S.C. § 2 (2004) (the "Sherman Act"), brought by Plaintiffs on their own behalf and on behalf of a class of persons similarly situated, those being persons who purchased software applications or licenses for software applications from the "iTunes" site or "App Store" owned and operated by Defendant Apple Inc. ("Apple") for use on an Apple iPhone between

December 29, 2007 and the present (the "Class Period").

A. Summary Of Material Facts

2. With great fanfare, Apple launched its first iPhone, called the iPhone 2G, on June 29, 2007. Prior to and after its launch, Apple hailed the iPhone as a revolutionary, "breakthrough" "smartphone" that functioned like a mobile computer with desktop-class email and other Internet communications capability. Apple built the iPhone's operating system, known as "iOS," to enable iPhone users to download and run computer-like software programs (called "applications" or "apps") to browse the Internet, transform music into cell phone ringtones, take photos, play games and engage in other functions typically performed on desktop or laptop computers.

3. Unbeknownst to iPhone consumers, however, from the time it launched the iPhone through the present date, Apple has engaged in an anticompetitive scheme to monopolize the aftermarket for iPhone applications in order to control and derive supracompetitive profits from the distribution of iPhone apps worldwide. As a result of its scheme, Apple has, from introduction of the iPhone 2G in 2007 through the present, cornered 100% of the worldwide distribution market for iPhone applications.

4. Apple has succeeded in totally eliminating any and all competition in that multibillion dollar market. Apple's App Store is the only store in the entire world – online or off-line – where the tens of millions of U.S.-based iPhone owners (and the many tens of millions of iPhone owners worldwide) can buy an iPhone app, and Apple's unlawful monopolization of the apps market

has enabled Apple to charge and collect a supracompetitive 30% fee from iPhone consumers for each and every one of the billions of iPhone apps they have bought since the iPhone's launch six years ago. Consequently, iPhone consumers nationwide have paid hundreds of millions of dollars more for iPhone apps than they would have paid in a competitive market.

5. Unlike traditional desktop or laptop computer manufacturers, whose computers' operating systems allow consumers to buy software applications from any and all competing software distributors, Apple's iOS system prohibits iPhone consumers from buying software applications from anyone other than Apple.

6. Even Apple's own iMac and MacBook desktop and laptop computers' operating systems – from which the iPhone's iOS operating system was derived – allow consumers to buy software from whatever source they like, and to pay the software manufacturer or distributor directly without having to pay an additional fee to Apple. There is no legitimate basis for Apple to treat its iPhone customers any differently than it treats its iMac or MacBook customers, or to charge its iPhone customers a 30% mark-up for any and all software they buy for their iPhones.

7. But when Apple developed its unique iPhone, Apple took advantage of the heavy demand for its novel product to equip it with an operating system that foreclosed iPhone consumers from buying software from any source other than Apple, and Apple then forced those foreclosed consumers to pay Apple a 30% fee for each and every iPhone app they buy. Stated in antitrust terminology, Apple improperly exploited its relationships with customers who purchased Apple's highly desirable and expensive iPhone by locking them

in, without their knowledge or consent, into an aftermarket for iPhone apps that was monopolized by Apple.

8. Apple's motive for its anticompetitive conduct was simple: Apple did not want its iPhone-related revenue stream to end when a consumer bought an iPhone, like it generally does when consumers purchase iMac and MacBook computers. So Apple concocted and maintained a plan to continue generating additional revenues over the entire useful life of every iPhone it sold by cornering the distribution market for iPhone applications and charging consumers an extra 30% for every app. Through this scheme Apple would profit not only from the sales of tens of millions of iPhones, it would also profit from each and every one of the billions of future apps sales made to Apple's iPhone customers.

9. Apple's anticompetitive scheme has generated enormous supracompetitive profits for Apple. Apple now offers more than 850,000 apps, and iPhone consumers worldwide have downloaded apps more than 50 billion times since July 2008. While the majority of iPhone apps are now free, United States iPhone consumers have been overcharged hundreds of millions of dollars for paid apps during the Class Period as a result of Apple's anticompetitive conduct.

10. That Apple has engaged in unlawful monopolistic behavior with respect to iPhone apps is perfectly consistent with Apple's attitude towards antitrust compliance generally. A federal district court judge who observed Apple's attitude towards antitrust compliance during a recent trial found that Apple had unlawfully fixed e-book prices and concluded that Apple as an institution simply "does not want to

engage in retail price competition" – indeed, "one of its principal goals was the elimination of all retail price competition," and "it was happy if a result of that . . . was an increases in prices" that "the consumer had to pay."[1]

11. That district court further stated that "[t]he record at trial demonstrated a blatant and aggressive disregard at Apple for the requirements of the law," (Hr'g Tr. 17:1-2) even among "Apple lawyers and its highest executives," (*id.* at 17:5-6) and concluded that an injunction was needed to ensure that a "comprehensive and effective" (*id.* at 19:18) antitrust compliance training program would be undertaken by "each of Apple's officers and directors engaged in whole or in part in activities relating to the supply of content," including "apps" (*id.* at 13:18-20). "Neither Mr. [Eddy] Cue," the Apple executive responsible for Apple's App Store, nor "his assigned in-house counsel, could remember [having] any training on antitrust issues," and "[t]hey and those on their teams need to understand what the law requires and how to conform their business practices to the law."[2]

12. Apple's unlawful monopolization of the iPhone applications aftermarket from July 2007 through the present is a direct reflection of Apple's goal of "eliminating all retail price competition" and its culture of disdaining antirust compliance in order to increase the prices its customers pay. Through its actions, Apple has unlawfully stifled competition by erecting impenetrable barriers to entry to would-be distributors

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1 Hearing Transcript ("Hr'g Tr.") at 11:4-5, 33:10-13, *U. S. v. Apple Inc.*, No. 12 Civ. 2826 (S.D.N.Y. Aug. 27, 2013).

2 Hr'g Tr. at 18:11-13.

of iPhone apps, reduced consumer choice in what would otherwise be a robust and competitive iPhone software applications marketplace, and artificially increased prices for iPhone software applications to supracompetitive levels.

13. Apple's illegal iPhone apps monopoly should be enjoined and dismantled, and Plaintiffs and the tens of millions of nationwide iPhone consumers they seek to represent should be reimbursed by Apple for the hundreds of millions of dollars they have been overcharged.

B. Summary Of Claims

14. In pursuit and furtherance of its unlawful anticompetitive activities, Apple: (a) failed to obtain iPhone consumers' contractual consent to Apple's monopolization of the iPhone applications aftermarket, the effect of which was to lock consumers into buying apps only from Apple and paying Apple's 30% fee, even if they wished to buy apps elsewhere or pay less; and (b) failed to obtain iPhone consumers' contractual consent to having their iPhones "locked" to prohibit them from using any app that was not approved or sold by Apple, thereby preventing iPhone purchasers from downloading and using other apps, called "Third Party Apps."

15. Apple violated Section 2 of the Sherman Act by monopolizing or attempting to monopolize the software applications aftermarket for iPhones in a manner that harmed competition and injured iPhone apps consumers by reducing output and consumer choice, and by increasing prices for iPhone apps to supracompetitive levels.

16. Plaintiffs seek declaratory and injunctive relief, treble and exemplary damages, costs and attorneys' fees. As for equitable relief, Plaintiffs seek an order restraining Apple from selling iPhones that are programmed in any way to prevent or hinder consumers from downloading Third Party Apps, or minimally, restraining Apple from selling or distributing iPhones without fist obtaining the consumers' express contractual consent to (a) buying apps only from Apple and (b) having their iPhones locked to accept only apps purchased from Apple.

THE PARTIES

17. Plaintiff Stephen H. Schwartz is an individual residing in Ardsley, New York who, in October 2010, purchased an iPhone and paid Apple for iPhone apps during the Class Period.

18. Plaintiff Edward W. Hayter is an individual residing in Brooklyn, New York who, in March 2008, purchased an iPhone and paid Apple for iPhone apps during the Class Period.

19. Plaintiff Eric Terrell is an individual residing in Oakland, California who, on or about June 29, 2007, purchased an iPhone and paid Apple for iPhone apps during the Class Period.

20. Plaintiff Robert Pepper is an individual residing in Chicago, Illinois who, on or about June 29, 2007, purchased an iPhone and paid Apple for iPhone apps during the Class Period.

21. Defendant Apple is a California corporation with its principal place of business located at 1 Infinite Loop, Cupertino, California 95014. Apple regularly conducts and transacts business in this District, as well as throughout Illinois, New York and elsewhere in the

United States. Apple manufactures, markets, and sells the iPhone, among other electronic devices.

JURISDICTION AND VENUE

22. This Court has federal question jurisdiction pursuant to the Sherman Act, the Clayton Antitrust Act of 1914, 15 U.S.C. § 15, and pursuant to 28 U.S.C. §§ 1331 and 1337.

23. This Court also has jurisdiction pursuant to 28 U.S.C. § 1332(d)(2) because sufficient diversity of citizenship exists between parties in this action, the aggregate amount in controversy exceeds $5,000,000, and there are 100 or more members of the proposed class.

24. Venue is proper in this District pursuant to 28 U.S.C. § 1391 because some Plaintiffs purchased iPhones in this District, Apple has its principal place of business in this District, a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred here, and Apple is a corporation subject to personal jurisdiction in this District and, therefore, resides here for venue purposes.

25. Each Plaintiff and member of the Class, in order to activate their iPhone, was required to accept Apple's "iPhone Terms and Conditions" (the "Terms"). The Terms state, in pertinent part, that "You expressly agree that exclusive jurisdiction for any claim or dispute with Apple . . . resides in the courts in the State of California."

FACTUAL ALLEGATIONS

A. Apple's Anticompetitive Conduct

26. In Spring 2007, Apple began a massive advertising campaign to market its new wireless

communication device, the iPhone. The iPhone was advertised as a combined mobile phone, iPod and "breakthrough" Internet communications device with desktop-class email, an "industry first" "visual voicemail," web browsing, maps and searching capability. The iPhone was, in effect, the world's first mobile computer. The iPhone shifted the paradigm for smartphones, and it changed the entire cell phone manufacturing industry.

27. Having designed and manufactured a highly advanced and desirable new product, Apple profited handsomely from selling its revolutionary new handset. The iPhone debuted on June 29, 2007, and despite its hefty $499 or $599 price tag, consumers waited in line to get their hands on one.[3] Apple has rightfully earned billions of dollars in revenue from selling its iPhones.

28. But Apple wanted more. It did not want to limit its revenues to what consumers were willing to pay for the iPhone itself. Apple wanted a substantial piece of every dollar that would ever be paid to buy any kind of software for the iPhone at any time anywhere in the world.

29. To achieve that end, Apple embarked on a scheme to monopolize the aftermarket for iPhone applications and to foreclose and protect Apple against

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[3] Initially, the 4GB iPhone 2G retailed for $499 and the 8GB iPhone 2G retailed for $599. Apple has since released five other iPhone models, the iPhone 3G, iPhone 3GS, iPhone 4, iPhone 4S and iPhone 5, and it is expected shortly to release its new iPhone 5S. Currently, Apple sells 16GB, 32GB and 64GB versions of the iPhone 5, which range in price from $199 to $849, unless they are purchased as part of a handset-subsidized voice and data service plan offered by a cell phone service provider such as Verizon, Sprint, T-Mobile or AT&T Mobility.

any and all competition it might face in the distribution of iPhone applications. In contrast to the robust competition Apple faces in the software aftermarket for its desktop and laptop computers, Apple wanted the entire iPhone software aftermarket for itself. Apple achieved its unlawful goal, through a series of actions.

30. Apple at all times retained exclusive control over the design, features and operating software for the iPhone, known as iOS, which is based on the same technologies that are used in Apple's desktop and laptop computers' operating systems, known as OS X. Although Apple has always maintained OS X as an "open" system that allows iMac and MacBook consumers to run software manufactured or sold by any distributor, Apple modified its iOS version to be a "closed" system by installing "security measures" or "program locks" designed to prevent iPhone consumers from installing and running apps that were not sold or approved by Apple.

31. Apple did not close the iOS system for the purpose of protecting its proprietary right to own, sell or license iOS. Apple closed the iOS system for the specific purpose, and with the specific intent, of foreclosing competition from other potential iPhone software manufacturers and distributors so that Apple could monopolize and derive monopoly profits from the iPhone apps aftermarket.

32. After Apple launched its iPhone 2G in June 2007, Apple enhanced its iPhone-related revenues either by developing its own apps for ringtones, instant messaging, Internet access, gaming, entertainment, video and photography or by enabling "approved" third party manufacturers to develop iPhone apps. Apple always conditioned its "approval" of such apps on the

third party's agreement to give Apple a share of the third party's sales proceeds.

33. However, because Apple's OS X and iOS operating systems were based on the widely available Unix platform and included technologies and services that were based on other open software systems, Apple's initial program locks designed to eliminate Third Party Apps proved ineffective, as clever third party programmers quickly circumvented Apple's security measures and made non-Apple approved iPhone apps available for sale on the Internet.

34. Almost immediately after the iPhone's launch unapproved Third Party Apps started to appear and threatened to compete with Apple in the iPhone apps aftermarket. For example, Mobile Chat and FlickIM gave iPhone users access to instant messaging programs from which Apple derived no revenues. Apple responded to these threats by updating its iOS to eliminate iPhone consumers' ability to use these Third Party Apps and by warning its iPhone customers that using Third Party Apps would nullify Apple's iPhone warranty.

35. Apple also faced threatened competition for iPhone ringtones. When a customer purchased a song for $1 from the Apple iTunes store, Apple charged the customer an additional 99 cents to convert any portion of that song into a ringtone. A number of competing programmers promptly offered a variety of ringtone programs that enabled iPhone consumers to download both songs and ringtones for free. Some of these programs allowed customers to use samples of popular songs lawfully downloaded from Apple's iTunes store as a ringtone. Other programs, such as I-Toner from Ambrosia Software and iPhone RingToneMaker from

Efiko software, allowed customers to "clip" portions of songs purchased by them from iTunes for use as ringtones.

36. Since many of these programs used songs downloaded from iTunes, Apple initially sought to block the use of those songs as ringtones by updating the iTunes software to install program locks that would interfere with such use. However, those efforts were all quickly defeated by third party programmers, sometimes within hours of the release of the update. So Apple again responded to these threats by updating its iOS to eliminate iPhone consumers' ability to use these Third Party Apps and by voiding the warranties of iPhone customers who used them.

37. Ultimately, Apple eliminated the threat of competition from unapproved apps developers by conceiving and implementing the App Store in order to become the exclusive distributor of iPhone apps, and by thereafter rigorously enforcing and maintaining its monopoly.

38. Apple laid the groundwork for its App Store in March 2008, when Apple released a "software development kit" ("SDK") for the stated purpose of enabling independent software developers to design applications for use on the iPhone. For an annual fee of $99, the SDK allows developers to supply apps to Apple for distribution through Apple's App Store.

39. Apple opened its App Store in July 2008. Apple owns 100% of the App Store, staffs the App Store with Apple employees or agents, and controls all of the App Store sales, revenue collections and other business operations.

40. Apple informs its prospective apps developers (though not its iPhone consumers) that the developers'

apps cannot be sold anywhere except in the App Store. Apple also informs its developers (but not its iPhone customers) that Apple will charge iPhone consumers a 30% commission for any non-free app sold in the App Store.

41. Consequently, the prices for apps available in Apple's App Store include the developers' price plus Apple's 30% mark-up. When an iPhone customer buys an app from Apple, it pays the full purchase price, including Apple's 30% commission, directly to Apple. Apple takes its 30% commission off the top and then remits the balance, or 70% of the purchase price, to the developer. Apple sells the apps (or, more recently, licenses for the apps) directly to the customer, collects the entire purchase price, and pays the developers after the sale. The developers at no time directly sell the apps or licenses to iPhone customers or collect payments from the customers.

42. On information and belief, throughout the Class Period, Apple threatened to terminate any developer that made its apps available on its own website or through a distributor other than Apple, and Apple continued to discourage iPhone customers from downloading Third Party Apps by telling customers that Apple would void and refuse to honor the iPhone warranty of any customer who downloaded a Third Party App.

43. By designing the iPhone iOS as a closed system, installing security measures and program locks to prevent Third Party App downloads, establishing the App Store as the exclusive worldwide distributor of iPhone apps, and enforcing the App Store's exclusive distributor status by terminating apps developers who sold apps in competition with Apple and voiding the

warranties of iPhone consumers who bought competing apps, Apple has since June 2007 willfully acquired and maintained a monopoly in the iPhone apps aftermarket and has positioned itself as the one and only distributor of iPhone apps on the entire planet. Apple has no competition in the multi-billion dollar iPhone apps aftermarket, domestically or abroad, whatsoever.

44. Prior to Plaintiffs' purchases of their iPhones, Apple had not even disclosed – much less obtained the Plaintiffs' contractual consent to – either (a) Apple's monopolization of and collection of monopoly profits from the iPhone applications aftermarket, or (b) having their iPhones locked to prohibit Plaintiffs from using any app that was not approved or sold by Apple. Absent obtaining Plaintiffs' contractual consent, Apple's monopolization of the iPhone applications aftermarket constitutes an antitrust violation under Section 2 of the Sherman Act.

B. Plaintiffs' Injuries

45. Plaintiffs have been injured by Apple's anticompetitive conduct because they paid more for their iPhone apps than they would have paid in a competitive market. Plaintiffs have also been injured because Apple's unlawful monopolization of the iPhone apps aftermarket has extinguished Plaintiffs' freedom of choosing between Apple's App Store and lower cost market alternatives that would have been available had Apple not monopolized the market. Plaintiffs have also been injured because Apple's establishment and maintenance of monopoly pricing has caused a reduction in the output and supply of iPhone apps, which would have been more abundantly available in a competitive market.

46. That Plaintiffs have paid supracompetitive prices is obvious for several reasons. Under basic and fundamental economic principles, the absence of competition leads to increased prices, and increased competition leads to lower prices. In a competitive market, an economically rational manufacturer or distributor will sell its products at prices equal to their cost plus a reasonable marginal rate of return (profit) dictated by the market environment. But an economically rational monopolist that is unconstrained by the downward pricing pressures of a competitive market will charge the highest price it can in light of the demand for its products; the greater the demand, the higher the profits. Indeed, it is hornbook economics that commercial entities strive to acquire and maintain monopoly power precisely because they want to reap the monopoly profits that market domination typically generates.

47. Apple and the iPhone apps aftermarket are not immune from these presumptively valid economic principles. Indeed, as shown above, the generation of monopoly profits was exactly why Apple chose to monopolize the iPhone apps aftermarket.

48. That Apple's 30% fee is a monopoly price is also obvious from Apple's cost structure. Each developer's $99 annual fee covers most or all of Apple's costs of reviewing that developer's apps and the related proportional costs of operating and maintaining the App Store, even if the developer submits several apps annually. As to successive sales of that developer's apps, therefore, Apple's 30% fee constitutes virtually pure profit for Apple. In a competitive environment, where developers could sell their apps on their own websites without charging Apple's 30% mark-up and

discount retailers could obtain volume discounts and sell for far less than a 30% profit, Apple would be under considerable pressure to substantially lower its 30% profit margin because, otherwise, its App Store would be priced out of the market and lose substantial market share. In a truly competitive iPhone apps distribution environment, Apple's 30% margin would be simply unsustainable.

49. A truly competitive iPhone apps distribution market would also give Plaintiffs and other iPhone customers the freedom to choose between Apple's high-priced App Store and less costly alternatives, such as buying direct from apps developers or volume-driven and other software discounters. Plaintiffs' freedom to choose between these market alternatives has been eliminated by Apple's monopolistic conduct, and Plaintiffs have been forced to pay supracompetitive prices to Apple as a result.

50. The lack of a truly competitive environment has also led to reduced output and supply of iPhone apps because developers are barred from selling apps at prices below Apple's inflated 30% marked-up price. Under basic economic principles, lower prices would generate both increased demand and increased supply to meet that demand in the iPhone apps aftermarket as a whole. Apple's unlawful monopoly naturally restricts both supply and demand.

C. Injury To Competition

51. The same conditions – the existence of supracompetitive pricing, reduced consumer choice among market alternatives, and reduced output and supply – demonstrate that Apple's monopolistic

conduct has likewise injured competition generally in the iPhone apps aftermarket.

52. The iPhone apps market is not remotely like the genuinely competitive personal computer software market, where computer hardware manufacturers – including Apple itself – do not control or have a financial stake in every sale of software that is downloaded on the computers they make. In the aftermarkets for desktop and laptop computer software, the software developers can offer products directly to consumers or through discounters without having to gain the computer manufacturer's approval and without the software customers paying the manufacturer a penny. Consequently, there is an abundant supply of competing software applications, and consumers can shop among multiple vendors without paying above market prices.

53. The iPhone apps market lacks all of these indicia of competitiveness. Because Apple has unlawfully cornered the nationwide (and, indeed, worldwide) distribution market for iPhone apps, the iPhone apps aftermarket has been harmed generally by Apple's anticompetitive conduct, which is precisely the type of harm the antitrust laws were enacted to remedy.

CLASS ALLEGATIONS

54. Plaintiffs bring this action as a class action on behalf of themselves and all others similarly situated for the purpose of asserting claims alleged in this Complaint on a common basis. Plaintiffs' proposed class (the "Class") is defined under Federal Rules of Civil Procedure 23(b)(2) and (3), and Plaintiffs propose to act as representatives of the following Class comprised of:

All persons in the United States, exclusive of Apple and its employees, agents and affiliates, and the Court and its employees, who purchased an iPhone application or application license from Apple for use on an iPhone at any time from December 29, 2007 through the present.

55. The Class for whose benefit this action is brought is so numerous that joinder of all members is impractical.

56. Plaintiffs are unable to state the exact number of Class members without discovery of Apple's records but, on information and belief, state that billions of iPhone apps or licenses for apps were purchased during the Class Period.

57. There are questions of law and fact common to the Class which predominate over any questions affecting only individual members including, among others, (1) whether Apple violated Section 2 of the Sherman Act by monopolizing or attempting to monopolize the aftermarket for iPhone software applications; (2) whether Apple's violation caused harm to the relevant market generally and to Plaintiffs and the Class specifically; and (3) whether Apple should be enjoined from continuing its monopolistic practices and from continuing to monopolize and charge monopoly prices in the iPhone apps aftermarket without first obtaining iPhone consumers' contractual consent.

58. The common questions of law and fact are identical for each and every member of the Class.

59. Plaintiffs are members of the Class they seek to represent, and their claims arise from the same factual and legal bases as those of the Class; they assert the same legal theories as do all Class members.

60. Plaintiffs will thoroughly and adequately protect the interests of the Class, having obtained qualified and competent legal counsel to represent them and those similarly situated.

61. The prosecution of separate actions by individual class members would create a risk of inconsistent adjudications and cause needless expenditure of judicial resources.

62. Plaintiffs are typical of the Class in that their claims, like those of the Class, are based on the same anticompetitive business practices and the same legal theories.

63. Apple has acted on grounds generally applicable to the Class.

64. A class action is superior to all other available methods for the fair and efficient adjudication of the controversy.

RELEVANT MARKET ALLEGATIONS

65. The iPhone is a unique, premium-priced product that generates a unique aftermarket for software applications that can be used only on iPhones. During at least the Class Period, the price of iPhones was not responsive to an increase in iPhone application prices because Apple did not obtain iPhone customers' knowledgeable contractual consent to Apple's monopolization of and monopoly pricing in the apps aftermarket. Consequently, (a) consumers who purchased iPhones could not, at the point of sale, reasonably or accurately inform themselves of the "lifecycle costs" (that is, the combined cost of the handset and its required services, parts and applications over the iPhone's lifetime); and (b) consumers were "locked into" the iPhone due to its

high price tag and would incur significant costs to switch to another handset. The aftermarket for iPhone applications is thus an economically distinct product market, and the applications that are distributed within that market have no acceptable substitutes.

66. The existence of competition in the smartphone market between Apple's iPhone and the makers of competing handsets such as Google's Android phones is irrelevant to the relevant market analysis in a Section 2 Sherman Act aftermarket monopolization case, in which the existence or lack of competition in the aftermarket at issue is the only economically meaningful inquiry. The existence of Android phone applications and applications geared toward other smartphone brands is likewise irrelevant because those applications are technologically incompatible with the iPhone and, therefore, are not reasonably interchangeable substitutes for iPhone apps. Even if those other smartphone apps were technologically compatible, Apple's exclusionary and monopolistic conduct would bar such apps from being sold in competition with Apple for the same reasons and in the same manner that Apple has foreclosed such competition for iPhone Third Party Apps generally.

67. The geographic scope of the iPhone applications aftermarket is national.

68. The aftermarket for iPhone applications includes the market for distributing software applications that can be downloaded on the iPhone for managing such functions as ringtones, instant messaging, photographic and video capability, gaming and other entertainment, Internet applications, and any other downloadable software-driven functions.

69. The applications aftermarket came into existence immediately upon the sale of the first iPhones because: (a) the applications aftermarket is derivative of the iPhone; and (b) no Plaintiff or member of the Class agreed to any restrictions on their ability to access a competitive iPhone applications aftermarket.

COUNT I

Unlawful Monopolization Of The Applications Aftermarket In Violation Of Section 2 Of The Sherman Act (Seeking Damages And Equitable Relief)

70. Plaintiffs reallege and incorporate paragraphs 1 through 69 above as if set forth fully herein.

71. Apple has acquired monopoly power in the iPhone applications aftermarket through unlawful, willful acquisition and maintenance of that power. Specifically, Apple has unlawfully acquired monopoly power by: (a) designing the iPhone iOS as a closed system and installing security measures and program locks for the specific purpose of preventing Third Party App downloads; (b) establishing the App Store as the exclusive worldwide distributor of iPhone apps; and (c) enforcing the App Store's monopoly status by terminating or threatening to terminate apps developers who sell apps in competition with Apple and by voiding the warranties of iPhone consumers who buy competing apps.

72. Apple's unlawful acquisition of monopoly power has reduced output and competition and resulted in increased, supracompetitive prices for products sold in the iPhone applications aftermarket and, thus, harms competition generally in that market.

73. Plaintiffs have been injured in fact by Apple's unlawful monopolization because they have been: (a) deprived of lower cost alternatives for apps; (b) forced to pay supracompetitive prices for apps; and/or (c) subjected to a lower output and supply of apps.

74. Apple's unlawful monopolization of the iPhone applications aftermarket violates Section 2 of the Sherman Act, and its unlawful monopolization practices are continuing and will continue unless they are permanently enjoined. Plaintiffs and members of the Class have suffered economic injury to their property as a direct and proximate result of Apple's unlawful monopolization, and Apple is therefore liable for treble damages, costs, and attorneys' fees in amounts to be proved at trial.

COUNT II

Attempted Monopolization Of The Applications Aftermarket In Violation Of Section 2 Of The Sherman Act (Seeking Damages And Equitable Relief)

75. Plaintiffs reallege and incorporate paragraphs 1 through 74 above as if set forth fully herein.

76. Defendant Apple has engaged in exclusionary, predatory and anticompetitive conduct with a specific intent to monopolize the iPhone applications aftermarket. Specifically, Apple has attempted unlawfully to acquire monopoly power by: (a) designing the iPhone iOS as a closed system and installing security measures and program locks for the specific purpose of preventing Third Party App downloads; (b) establishing the App Store as the exclusive worldwide distributor of iPhone apps; and (c) enforcing the App Store's unlawfully acquired market position by

terminating or threatening to terminate apps developers who sell apps in competition with Apple and by voiding the warranties of iPhone consumers who buy competing apps.

77. Apple's anticompetitive actions have created a dangerous probability that Apple will achieve monopoly power in the applications aftermarket because Apple has already unlawfully achieved an economically significant degree of market power in that market and has effectively foreclosed new and potential entrants from entering the market or gaining their naturally competitive market shares.

78. Apple's attempted acquisition of monopoly power has reduced output and competition and resulted in increased, supracompetitive prices for products sold in the iPhone applications aftermarket and, thus, harms competition generally in that market.

79. Plaintiffs have been injured in fact by Apple's attempted monopolization because they have been: (a) deprived of lower cost alternatives for apps; (b) forced to pay supracompetitive prices for apps; and/or (c) subjected to a lower output and supply of apps.

80. Apple's attempted monopolization of the iPhone applications aftermarket violates Section 2 of the Sherman Act, and its anticompetitive practices are continuing and will continue unless they are permanently enjoined. Plaintiffs and members of the Class have suffered economic injury to their property as a direct and proximate result of Apple's attempted monopolization, and Apple is therefore liable for treble damages, costs, and attorneys' fees in amounts to be proved at trial.

WHEREFORE, Plaintiffs respectfully request that the Court enter judgment against Apple as follows:

a. Permanently enjoining Apple from monopolizing or attempting to monopolize the iPhone applications aftermarket or, minimally, restraining Apple from selling or distributing iPhones without first obtaining the consumers' express contractual consent to (a) Apple's monopolization of and charging of monopoly prices in the iPhone apps aftermarket, and (b) having their iPhones locked to accept only apps or purchased from Apple;

b. Awarding Plaintiffs and the Class treble damages for injuries caused by Apple's violations of the federal antitrust laws;

c. Awarding Plaintiffs and the Class reasonable attorneys' fees and costs; and

d. Granting such other and further relief as the Court may deem just and proper.

DEMAND FOR TRIAL BY JURY

Plaintiffs hereby demand a trial by jury.

DATED: September 5, 2013

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No. 17-204

In the Supreme Court of the United States

APPLE INC.,

Petitioner,

v.

ROBERT PEPPER, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Whether there is a compelling reason to review the Ninth Circuit's determination, in accordance with the well-settled standing requirement of *Illinois Brick v. Illinois*, 431 U.S. 720 (1977), that the plaintiffs have antitrust standing where they allege they purchased software applications through an online store owned by the alleged monopolist, Apple Inc., and paid the entire purchase price for the applications *directly to the monopolist, which retained the entire monopoly profit for itself?*

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BRIEF IN OPPOSITION

Respondents, Robert Pepper, Stephen H. Schwartz, Edward W. Hayter, and Eric Terrell (hereinafter "Respondents"), respectfully submit this opposition to the petition by Apple, Inc. ("Apple" or "Petitioner") for a writ of certiorari.

SUMMARY

This case involves claims that Petitioner Apple, Inc. (hereinafter "Petitioner" or "Apple") illegally monopolized the sale of software applications (commonly called "apps") for use on Apple's iPhone, pursuant to which Respondents and a proposed class of all other apps purchasers paid Apple a 30% monopolistic surcharge for each app purchased. Respondents allege in the complaint (the "Complaint") that they and all other apps purchasers bought the apps *directly from the alleged monopolist* on an online store (called the "App Store") *owned and operated by the monopolist*. Respondents allege that they paid the full price for the apps *directly to the monopolist*, which kept all the monopoly profits for itself. Respondents also allege that the developers of the software applications (the "apps developers") *made no payment whatsoever* to Apple, other than a $99 annual registration fee.

Apple argued below that the only victims of the alleged monopoly with standing to sue under this Court's seminal *Illinois Brick* decision were the apps developers, not the apps purchasers who actually paid the supra-competitive prices to the monopolist, based on so-called "antecedent transactions" that took place between Apple and the apps developers before the apps

were sold to iPhone purchasers on the App Store, whereby the apps developers effectively absorbed the 30% markup themselves because they were "aware" of it and set their prices accordingly. However, in a thorough and well-reasoned analysis of the allegations of the Complaint, a panel of the Ninth Circuit unanimously found that Respondents plausibly allege standing under the straightforward "direct purchaser" requirement set forth in *Illinois Brick*. After briefing by the parties, the full Ninth Circuit denied Apple's petition for rehearing *en banc*.

Apple urges the Court to grant certiorari ostensibly to correct the Ninth Circuit's purported misapplication of *Illinois Brick* to the particular facts alleged in the Complaint. But the Ninth Circuit's analysis of the Complaint and its decision with respect to Respondents' standing is on all fours with *Illinois Brick*. Thus, it is apparent that Apple does not seek *certiorari* in order to have the Court correct a misapplication of law by the Ninth Circuit, but in order to have the Court *change* the law. Specifically, Petitioner seeks to have the Court jettison the straightforward direct purchaser requirement of *Illinois Brick* and replace it with a new "antecedent transaction" analysis, an approach to antitrust standing finds no support in this Court's precedent, would invite the same factual complications and speculation on damages that the bright-line standing test of *Illinois Brick* seeks to avoid, and would often leave nobody with standing to sue a monopolist (as would be the case here).

As Apple acknowledges, the "antecedent transaction" approach has been applied by only one circuit court, the Eighth Circuit in *Campos v. Ticketmaster Corp.*, 140 F.3d 1166 (8th Cir. 1998), *cert. denied*, 525 U.S. 1102 (1999), which was a split panel decision with a strong dissent. Moreover, that two appellate courts, *each applying the same well-settled law*, reached different results based on different factual allegations is not a "conflict" of the sort that warrants certiorari. *See* Supreme Court Rule 10 (stating that *certiorari* is "rarely granted" based on a circuit court's misapplication of a properly stated rule of law). And Respondents respectfully submit that if one of the two appellate decisions misapplied the law, it was the split panel of the Eighth Circuit in *Campos*, not the Ninth Circuit here. Thus, the Court is being asked to correct the misapplication of law by *another* court almost two decades ago.

Since *Illinois Brick* was decided 40 years ago, courts throughout the nation have had no trouble applying its "direct purchaser" standing requirement to various factual settings, including cases in which some form of payment is made to an alleged monopolist prior to the monopolist's sale of a product. There is no need for this Court to change the law now by replacing the clear "direct purchaser" standing requirement of *Illinois Brick* with a far more complex "antecedent transaction" standing requirement, and certainly not on a motion to dismiss prior to the factual development in this case.

STATEMENT OF THE CASE

This antitrust class action was brought pursuant to Section 2 of the Sherman Act, 15 U.S.C. § 2. Respondents brought this action on behalf of themselves and a class of all others who purchased software applications (or "apps") from Apple's online store for use on their iPhones from December 29, 2007 to present. ¶ 1.[1]

In 2008, faced with the threat of competition from apps developers able to sell their products to iPhone users without providing any benefit to Apple, Apple made itself the exclusive distributor of iPhone apps and rigorously maintained a monopoly on the sale of iPhone apps by approving only apps made by developers who gave Apple the exclusive worldwide right to distribute those apps through the Apple's App Store. ¶ 37. To this end, Apple contracted with apps developers, who agreed to pay Apple an annual registration fee of $99 for Apple's distribution services and to supply their apps only to Apple for distribution solely through the App Store. ¶ 38. Apple owns 100% of the App Store and controls all App Store sales, revenue collection, and other business operations. ¶ 39.

Apple charges apps purchasers a 30% commission on each app sale (unless it is a free app). ¶ 40. The price paid by purchasers for an app is the amount set by the apps developer, *plus* Apple's own supra-competitive 30% markup, both of which are paid

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[1] The operative complaint is included in Petitioner's appendix at pp. 40a-64a. Paragraphs of the Complaint are referenced herein as "¶ ___."

directly to Apple, the alleged monopolist, every time an app is purchased. ¶ 41. Apple keeps the entire supra-competitive portion of the purchase price for itself and remits the balance to the apps developers. *Id.* The apps developers do not sell their apps to iPhone customers or collect any payment from iPhone customers, and iPhone customers are the only purchasers in the entire chain of distribution. ¶¶ 38-41. Respondents seek damages based solely on the 30% markup. *Id.*

The district court dismissed the Complaint, holding that Respondents lacked direct purchaser standing under *Illinois Brick* because the supra-competitive fees they paid to Apple were "a cost passed-on to consumers by independent software developers." Pet. at 37a. The Ninth Circuit reversed, holding that Respondents had plausibly alleged that they were direct purchasers with antitrust standing under *Illinois Brick*. Pet. at 17a-22a.

CONSIDERATIONS GOVERNING THE DECISION AS TO WHETHER TO GRANT A WRIT OF CERTIORARI

Under Supreme Court Rule 10, a petition for a writ of certiorari "will be granted only for compelling reasons." Under Rule 10, certiorari may be granted if a Court of Appeals "has entered a decision in conflict with the decision of another Court of Appeals on the same important matter," or where a Court of Appeals "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Moreover, pursuant to Rule 10, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of properly stated rule of law."

None of the possible reasons for granting certiorari are present here. There is no credible appellate court conflict, and the Ninth Circuit's decision is fully consistent with this Court's precedent. At most, any conflict between circuits is the result of the misapplication of a properly stated rule of law *by another court* nearly two decades ago.

REASONS FOR DENYING THE PETITION

I. THE NINTH CIRCUIT DID NOT DEVIATE FROM SUPREME COURT PRECEDENT

In *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), following *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), this Court set forth a bright-line test whereby the first party in the distribution chain to buy the alleged monopoly-priced product from the alleged monopolist is the party with standing to sue. To determine standing under *Illinois Brick*, courts must look to the chain of distribution of the price-tainted product, and may not forge exceptions to the bright-line rule or apportion losses among various levels of the distribution chain. *Id.* at 734-743.

As alleged in the Complaint, Respondents buy iPhone apps directly from the monopolist, Apple, and pay the *entire* purchase price, including the allegedly monopolistic 30% commission, directly to Apple, which keeps the supra-competitive charge for itself. ¶¶ 38-41. Meanwhile, apps developers never pay anything to Apple. Respondents are therefore undoubtedly the first party in the distribution chain to buy from the monopolist. *Id.* Viewing the factual allegations in a light most favorable to Respondents, the Ninth Circuit properly found that Respondents were "direct

purchasers" with standing to sue under *Illinois Brick*. Pet. at 17a-22a.

Apple argues that certiorari is warranted because the Ninth Circuit's ruling created "a brand new distributor function" rule based on a "manufacturer-distributor dichotomy" that undermines the policies of *Illinois Brick* and opens the door to the complications of a new type of "pass-through" liability as well as "duplicative recoveries." Pet. at 3-4, 27-29. However, the Ninth Circuit created no new standing rule. To the contrary, the Ninth Circuit strictly adhered to this Court's precedent and faithfully applied the *Illinois Brick* direct purchaser standing requirement to the facts alleged in the Complaint. Apple simply does not like the law as it is, and seeks to avoid liability altogether by having the Court eschew the "bright-line" test of *Illinois Brick* in favor of a new complex and theoretical "antecedent transaction" analysis.

A. The Ninth Circuit Did Not Create a New "Distributor Function" Standing Rule

Taking out of context the Ninth Circuit's statement that "[t]he key to the analysis is the function Apple serves rather than the manner in which it receives compensation for performing that function" (Pet. at 9, citing 20a-21a), Apple argues that the Ninth Circuit created a new antitrust rule based on the formalistic reliance of an alleged antitrust violator's role in the supply chain. But the Ninth Circuit did not say or imply that its standing analysis began and ended with whether Apple functioned as a distributor. Rather, the Ninth Circuit was merely situating Apple's role in the supply chain in response to Apple's argument that "because it sells distribution services to app developers,

it cannot simultaneously be a distributor of apps to app purchasers." Pet. at 19a. Doing so, the Ninth Circuit concluded that Apple's 30% markup was first paid by apps purchasers to Apple, which was acting *as the distributor* in the supply chain.

In addition, the Ninth Circuit was addressing the related question of whether Respondents' claim was against Apple or the apps developers, and in that regard it was assessing the allegations of the Complaint against the allegations in a prior case, *Delaware Valley Surgical Supply, Inc. v. Johnson & Johnson*, 523 F.3d 1116 (9th Cir. 2008), in which it had determined that a purchaser had standing to sue *the distributor* rather than the manufacturer. Pet. at 17a-18a, 21a.

Further, the Ninth Circuit was responding to Apple's argument (which Apple continues to make on the Petition) that it was acting more like an "agent" for the apps developers than as a distributor. This is so, Apple argued, because it did not buy the apps from the apps developers and set the prices - the apps prices were "entirely set" by the apps distributors. Pet. at 28-29. The Ninth Circuit correctly rejected that argument. Pet. at 19a-20a. As Respondents allege in the Complaint, Apple in fact set the *entire* monopolistic 30% commission that was charged to the apps purchasers, *without any involvement whatsoever from the apps developers.* ¶ 41.[2]

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[2] The Ninth Circuit also rejected Apple's analogizing itself to a passive shopping mall that merely leases physical space to various retail stores. Pet. at 19a. In addition to the fact that apps developers are prevented by Apple from selling through their own stores, it is Apple, not the apps developers, who sets and receives

Indeed, the Ninth Circuit made clear it was not basing its decision on the formalities or mechanics of payment, *i.e.*, on the fact that it was Respondents who actually paid the 30% markup. *See* Pet. at 20a ("We do not rest our analysis on the fact that Plaintiffs pay the App Store, which then forwards the payment to the app developers, less Apple's thirty percent commission. Whether a purchase is direct or indirect does not turn on the formalities of payment or bookkeeping arrangements. . . . Nor do we rest our analysis on the form of the payment Apple receives."). Rather, the Ninth Circuit took its analysis a step further and confirmed, based on the "function" that Apple was performing in the commercial chain at issue, that the 30% markup was charged by Apple directly to apps purchasers.

B. The Ninth Circuit Did Not Ignore the "Pass-Through" Implications of Its Ruling

Petitioner also argues that the Ninth Circuit's analysis ignored the "pass-through" concerns of *Hanover Shoe*, 392 U.S. at 493, in which the Court held that allowing a pass-through defense would inevitably lead to "complicated proceedings involving massive evidence and complicated theories," and *Illinois Brick*, 431 U.S. at 734-35, in which the Court held that "the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers rather than by allowing every

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the 30% markup. In Apple's shopping mall analogy, Apple is like a mall if the mall charged a 30% commission to shoppers on top of what shoppers paid to the mall's retail stores.

plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it." Pet. at 19-25. However, the Ninth Circuit squarely addressed the pass-through concern in its decision, concluding that apps purchasers were the direct victims of the monopolistic overcharge and that the damage was not passed on to them by the apps developers or anyone else, but rather was imposed on them by Apple. Pet. at 13a-17a.

As the Ninth Circuit concluded, there is no question that purchasers of apps first paid the overcharge. *See* Pet. at 20a ("Apple does not take ownership of the apps and then sell them to buyers after adding a markup of thirty percent. Rather, it sells the apps and adds a thirty percent commission."). Thus, to the extent that there was any "pass-through" damage, it occurred when Apple did not remit to the apps developers the entire payment made by the apps purchasers, making the developers, at best, "indirect purchasers." *See Kansas v. Utilicorp United, Inc.*, 497 U.S. 199, 207 (1990) (defining "indirect purchaser" as one who is not the "immediate buyer[] from the alleged antitrust violator"); *California v. ARC America Corp.*, 490 U.S. 93, 96 (1989) (indirect purchaser is one who "[does] not purchase [the monopolized product] directly from the [antitrust] defendant").

Apple's real point is not that the apps developers passed their injury on to the apps purchasers, but that the apps purchasers, even though they paid the 30% markup, *were not damaged* because absent the monopoly they would have paid the same 30% to the apps developers. That argument is flawed for several reasons.

First, under clear Supreme Court precedent, an antitrust defendant cannot decrease its exposure to damages with a pass-through *defense* – *i.e.*, by proving that the plaintiff was not actually damaged, even though it paid a monopolistic overcharge, because it passed the overcharge on to another. *Hanover Shoe*, 392 U.S. at 492.

Second, while Apple may be able to later show that the actual damages to the apps purchasers are less than the full 30% markup they paid to Apple – based on a number of theories, including that the markup should be reduced by some amount that apps developers would have been able to charge to the apps purchasers – that is not an *Illinois Brick* standing issue. At most, it raises questions of law and fact relating to the measure and amount of damages. *See St. Louis I.M. & S.R. Co. v. Craft*, 237 U.S. 648, 661 (1915) (proper measure of damages "involves only a question of fact"); *Wolff & Munier, Inc. v. Whiting-Turner Contracting Co.*, 946 F.2d 1003, 1009 (2d Cir. 1991) (amount of recoverable damages is a question of fact while measure of damages is a question of law).

Finally, Apple's underlying argument that the apps developers were the ones harmed because they were prevented from collecting the 30% markup charged to consumers by Apple is based upon hypothetical facts that do not exist. In the real world alleged in the Complaint, selling iPhone apps directly to consumers is not possible without the Apps Store. Moreover, even in the hypothetical world, Apple's theory that apps developers could or would have charged the entire price to the apps purchasers absent the monopoly relies on

wholly unsound speculation regarding supply and demand economics and other matters.

C. The Ninth Circuit's Decision Does Not Create a Danger of "Duplicative Recoveries"

Petitioner also asserts that the Ninth Circuit's refusal to apply the novel "antecedent transaction" analysis raises the specter of "duplicative recoveries" that the Court sought to avoid in *Illinois Brick*. Pet. at 25-27. This argument is a red herring for multiple reasons.

First, as an initial matter, there is no possibility of a double recovery under the Ninth Circuit's analysis because there is only *one 30% markup*. Thus, a claim by the apps developers, even if they had one, would not *overlap* the 30% markup paid by apps purchasers. Rather, it is a piece of the same 30% pie. Any claim by the apps developers that any part of the 30% markup was lost by them would diminish the purchasers' claim by the same amount.

Second, the above is purely academic because the app purchasers were the first to absorb any damage and the apps developers therefore have no standing to sue under *Illinois Brick*.

Third, the apps developers may well have benefitted from the existence of Apple's alleged monopoly and the use of Apple's platform because Apple could force purchasers to pay a higher purchase price for the apps than the developers otherwise would have been able to charge. *See Campos*, 140 F.3d at 1171 (noting that its decision that the concert venues rather than ticket purchasers had direct purchaser standing would have

been different if the venues were alleged to have been beneficiaries of the monopoly).

Finally, the apps developers would likely have no viable legal claim against Apple because they knowingly consented to Apple's monopolization of the iPhone apps aftermarket. *See Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451, 473-78 (1992) (no viable antitrust claim by purchasers who knowingly consent to anticompetitive conduct); *Newcal Indus., Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1049 (9th Cir. 2008) (viable aftermarket claim only when plaintiff does not knowingly consent to anticompetitive conduct).[3]

II. THERE IS NO CREDIBLE CONFLICT BETWEEN THE NINTH CIRCUIT'S DECISION BELOW AND THE EIGHTH CIRCUIT'S DECISION IN *CAMPOS*

In *Campos*, concertgoers sued Ticketmaster for monopolizing the market for concert distribution services, which they argued Ticketmaster was able to achieve by entering into exclusive contracts with most of the popular concert venues. *Id.*, 140 F.3d at 1169-71. The Eighth Circuit majority decision found that agreements between Ticketmaster and the concert venues were "antecedent transactions" in which the

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[3] The Ninth Circuit's statement that it made "no difference" to its analysis whether the apps developers might *also* have a claim (Pet. at 20a), does not affect its decision. Whether apps developers have a claim outside of the 30% markup (for the $99 annual fee or loss in the purchase price they were able to charge) would be determined by the court if and when the apps developers were to bring such a claim.

concert venues (not the consumers paying Ticketmaster's service fees) were the ones directly damaged, because the concert venues could otherwise have built Ticketmaster's service fees into the ticket price they charged to consumers. *Id.* at 1171-72. The Eighth Circuit's dissenting decision read the factual allegations very differently: "Ticketmaster supplies the product [ticket distribution services] directly to concert-goers; it does not supply it first to venue operators who in turn supply it to concert-goers." *Id.* at 1174. Consequently, the dissent found that "the entirety of the monopoly overcharge, if any, is borne by concert-goers." *Id.*

There is no difference between the Eighth and Ninth Circuit panel decisions as to the well-settled law on standing. The difference in outcomes in the two cases is based on the different factual allegations and the different ways the courts viewed those different allegations. Indeed, in the FTC's brief opposing certiorari in the *Campos* case, cited by Petitioner (*see* Pet. at 3 n.1), the FTC argued that certiorari should be denied because "the lower court's construction of the complaint is amply supported by the petitioners' specific factual allegations." Likewise, certiorari should be denied here for the simple reason that the allegations of the Complaint amply support the Ninth Circuit's unanimous decision that Respondents have direct purchaser standing under the *Illinois Brick* bright-line test.

To be sure, the Ninth Circuit went beyond factually distinguishing *Campos*, and, as Petitioner notes, criticized the way the majority in *Campos* applied *Illinois Brick* to the factual allegations before it. Pet.

at 18a-19a. But criticism by one circuit court as to how another circuit court applies well-settled law to the factual allegations of a complaint does not rise to the level of a circuit "split" that provides grounds for granting certiorari. *See* Supreme Court Rule 10. There is no conflict between these two circuits *as to what the law is*.

Further, if one of the two courts misapplied the law, Respondents respectfully submit it was the Eighth Circuit majority that did so. As the dissent stated in *Campos*, the concept of an "antecedent transaction" appears nowhere in *Illinois Brick* or any other direct purchaser case and upends the traditional rule that an "indirect purchaser" is "someone in a vertical supply chain who purchases a monopolized product from someone *other than* a monopolist":

> A mere 'antecedent transaction' will *not* turn all purchasers of a monopolized product into indirect purchasers for the purposes of *Illinois Brick*. . . . The monopoly product at issue in this case is ticket distribution services, not tickets. Ticketmaster supplies the product *directly to concert-goers*; it does not supply it first to venue operators who in turn supply it to concert-goers. It is *immaterial* that Ticketmaster would not be supplying the service but for its antecedent agreement with the venues.

Id. at 1174 (Arnold, J.) (emphasis added; citations omitted).[4]

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[4] Even accepting an "antecedent transaction" analysis, it appears that the Eighth Circuit majority misunderstood the facts of the

Indeed, in the many years since it was decided, *Campos* has never been applied by any other federal court of appeals or federal district court and it has been widely criticized.[5] Hence, this Court would be granting certiorari in order to correct *another* circuit's misapplication of the law nearly two decades ago.

III. THERE IS NO NEED TO RE-VISIT *ILLINOIS BRICK*

Apple asserts that it is important to revisit *Illinois Brick* because "the same or similar agency or consignment sales models are increasingly prevalent in online electronic commerce and facilitate billions of dollars in transactions annually." Pet. at 29. But despite Apple's alarmist argument, the sky is not falling. The decision of the Ninth Circuit, applying well-settled law to the facts alleged in the Complaint, poses no more and no different risks to antitrust

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case. The Eighth Circuit theorized that "a venue free from Ticketmaster's domination of ticket distribution would be able to charge that price itself, without having to cede to Ticketmaster a portion of that price in the form of supra competitive service fees." *Id.* at 1172. But in fact concert venues did not sell tickets at their box office windows at a price that included the amount of Ticketmaster's service fee.

[5] *See, e.g.*, J.P. Bauer, *"The Stealth Assault on Antitrust Enforcement: Raising the Barriers for Antitrust Injury and Standing,"* 62 U. Pitt. L. Rev. 437, 446-47 (Spring 2001)("Although there was some prior relationship between the concert venues and Ticketmaster, this was clearly not a situation where Ticketmaster had created a product and then sold it at an elevated price to its 'direct purchaser,' which in turn sold it to the indirect buying plaintiffs. Here, the plaintiffs dealt directly with the defendant and paid the overcharge directly to it.")

violators than previously existed under well-settled law.

As this Court explained in *Illinois Brick*, the limitation on standing to those who purchased directly from an antitrust violator is meant to avoid undesirable complexities, including the difficulty of allocating a monopoly overcharge among those who might have absorbed part of it. *Id.* at 737-43. Accordingly, the Court stated that "the antitrust laws will be more effectively enforced concentrating the full recovery for the overcharge in the direct purchasers rather than allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it." *Id.* at 734-35. *See also Utilicorp*, 497 U.S. at 218-19 (1990) (declining to create an exception to the direct purchaser rule for customers of regulated public utilities). The Court also noted that the rule allowing recovery by only direct purchasers more effectively serves "the legislative purpose in creating a group of 'private attorneys general' to enforce the antitrust laws." *Illinois Brick*, 431 U.S. at 746.

Replacing *Illinois Brick*'s bright-line "direct purchaser" requirement with an "antecedent transactions" analysis would open the door to the very complications that *Illinois Brick* sought to avoid. Indeed, those who do business with a monopolist-manufacturer or monopolist-distributor *prior to* the monopolist's sale of a product might receive a lower (or in some cases higher) price for the product delivered to the monopolist absent the monopoly. Evaluating damages to those parties would require a court to engage in a highly speculative supply and demand

analysis regarding how much a market would bear for a product or component of a product sold to a monopolist prior to the monopolist's actual sale, a far different and far more complex analysis than what a purchaser overpays for a product. And, of course, there may be multiple "antecedent" transactions, making such analysis increasingly complex, if not impossible.

In addition, as discussed above, looking to antecedent activity would often mean that there is no direct victim with standing to sue the monopolist, thereby allowing a monopolist to "retain the fruits of [its] illegality because no one [will be] available who would bring suit against them," *Hanover Shoe, Inc.*, 392 U.S. at 494, a result that would contravene the goal of promoting the "vigorous enforcement of the antitrust laws," *Utilicorp*, 497 U.S. at 214. This is, of course, Apple's aim.

Finally, this case would serve as a bad vehicle to address whether *Illinois Brick* should be unraveled to make way for an "antecedent transaction" approach to antitrust standing, particularly on a motion to dismiss before further facts are developed concerning the transactions at issue as well as the nature and scope of the alleged monopoly. Respondents allege they paid the entire monopolized 30% overcharge to the monopolist when purchasing apps in Apple's App Store and that no amount was ever paid by or charged to apps developers prior to that transaction. In other e-commerce transactions, however, manufacturers are charged up-front and, arguably, they are the first in line to pay a monopolist its overcharge. Further, under the facts alleged here, the apps developers consented to the commission charged by Apple to apps purchasers

and may have benefitted from Apple's grip on the market because they were able to charge higher prices for their apps due to Apple's monopoly control. That is also certainly not always the case.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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RECORD AND BRIEFS

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In the Supreme Court of the United States

IN RE APPLE IPHONE ANTITRUST LITIGATION,

APPLE INC.,

Petitioner,

v.

ROBERT PEPPER, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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ARGUMENT

This case is about whether *consumers* have antitrust standing to sue Apple for the commission Apple charges *app developers*. The Ninth Circuit incorrectly held that they do, in a decision that expressly announces a circuit split and cannot be reconciled with this Court's precedent.

Respondents' opposition is built around obfuscating and misrepresenting both the record and the Ninth Circuit's decision. But the Ninth Circuit was, if nothing else, forthright and direct about its holding.

- It held squarely that Apple is subject to suit by consumers solely because it performs the "function" of a "distributor" by handling the delivery of apps to purchasers.
- It stated clearly that nothing else matters—including who is selling what to whom, who sets the price, who collects and distributes the funds from the consumer, and whether the app developers can also sue Apple for treble damages on the exact same commissions. And it never addressed the fundamental question of whether some or all of Apple's commission was passed-through to consumers, signaling that pass-through does not matter either.
- It also acknowledged that its understanding of the law conflicts with that of the Eighth Circuit in *Campos v. Ticketmaster Corp.*, 140 F.3d 1166 (8th Cir. 1998), *cert. denied*, 525 U.S. 1102 (1999), a case relied on by the district court. The Ninth Circuit held *Campos* was wrongly decided and embraced its dissent.

Respondents attempt to deny that any of this happened. They deny that the Ninth Circuit created a brand-new "distributor function" rule, even though it systematically explained why Apple's distribution of apps to consumers was the only thing that mattered to its analysis. They deny that the Ninth Circuit's decision creates an irreconcilable split with the Eighth Circuit's decision in *Campos*, even though the Ninth Circuit expressly said so. And they deny—as they tried to deny before the district court—that app developers set app prices, when there is no doubt whatsoever that developers do.

None of these arguments refute the fact that the Ninth Circuit's decision is now the controlling case on the "direct purchaser" doctrine for electronic commerce, especially given the heavy concentration of technology companies in the Ninth Circuit. The decision is wrong and dangerous, and it is imperative that certiorari be granted now.

1. ***Three Factual Corrections.*** The opposition is built around three recurring misrepresentations about facts not genuinely in dispute. Ironically, none are germane to the Ninth Circuit's "distributor function" analysis; they explicitly do not matter under its reading of the law. However, Apple agrees that these are important facts, and responds to correct the record.

First, the opposition strives to convey the impression that consumers are directly harmed by Apple's alleged monopoly by suggesting that Apple "monopolized" an apps market. Respondents' complaint, however, alleges that Apple monopolized the market for iPhone app *distribution*, to wit: "Apple has, from introduction of the iPhone 2G in 2007 through the present, cornered 100% of the worldwide

distribution market for iPhone applications." Pet. App. 41a (¶ 3). It is undisputed here that developers have agreed by contract to pay Apple a 30% commission for (among other things) distribution services. Consumers purchase iPhone apps via Apple's App Store, but they do not purchase the allegedly monopolized service.

Second, Respondents continue to suggest that Apple adds a separate 30% fee "on top of" the final app prices set by developers and paid by consumers, even though it is settled that developers set the prices and consumers do not pay a penny more. Opp. 8 n.2; *id.* at 1, 4. As the district court held and as *amicus curiae* ACT | The App Association confirms, developers own their apps, sell them to consumers via Apple's App Store, and set the exact, final price paid for those apps. The district court took great care to get this issue right, giving Respondents every opportunity to allege that Apple adds its fees "on top of" the final app prices set by a developer. Respondents have never been able to so allege because they know the system does not work that way.

Third, Respondents claim that the app developers "*made no payment whatsoever* to Apple, other than a $99 annual registration fee." *Id.* at 1. That is not true. It is undisputed (and common knowledge) that developers agree contractually with Apple to pay Apple a 30% commission on their sales of paid apps. Apple collects the full price set by the developer for the app, deducts its 30% commission, and remits the balance to the developer. That is a payment to Apple, and even the Ninth Circuit recognized that any particular flow of funds is unimportant. Pet. App. 20a.

2. ***The Circuit Split with Campos.*** Apple cited *Campos* in moving to dismiss the complaint, and the

district court cited *Campos* in dismissing the complaint. The Ninth Circuit then acknowledged that *Campos* considered facts similar to those presented here. But rather than follow *Campos*, the Ninth Circuit disagreed with the Campos majority's legal analysis—adopting the dissent's analysis instead.

Respondents argue there is no circuit split because the two cases apply the same "well-settled law" to different facts, and that the Ninth Circuit only "criticized the way the majority in *Campos* applied *Illinois Brick* [*Co. v. Illinois*, 431 U.S. 720 (1997)] to the factual allegations before it." Opp. 3, 14. That is not a credible reading of the Ninth Circuit's opinion, or the Eighth's. The Ninth Circuit stated that *Campos* dealt with "a transaction closely resembling the transaction in the case before us," but that it "disagree[d] with the majority's analysis in [*Campos*]" because, "[a]s Judge Morris Arnold pointed out in dissent, the majority's 'antecedent transaction' analysis has no basis in Supreme Court precedent." Pet. App. 18a-19a. The Eighth Circuit would consistently reach the opposite outcome in a case like this one, because it understands and applies the legal principles differently. It does not place dispositive weight on whether the defendant performs the "function" of a "distributor," but instead looks to the parties' actual commercial arrangements and to whether adjudication of the plaintiff's claim would require resolution of the pass-through and apportionment problems that the *Illinois Brick* doctrine was designed to eliminate. Under that reading of the law, consumer plaintiffs such as those here, who have not purchased the monopolized distribution service, cannot sue because they cannot be claiming a direct injury. The Ninth Circuit understood

that, which is why it felt obliged to openly disagree with the *Campos* decision. This is a paradigmatic circuit split ripe for this Court's review.

Contradicting themselves, Respondents argue in the "alternative" that the *Campos* legal analysis should be rejected because it wrongly takes account of "antecedent transaction[s]." Opp. 3, 13-16 (citing *Campos*, 140 F.3d at 1169-70 ("An indirect purchaser is one who bears some portion of a monopoly overcharge only by virtue of an antecedent transaction between the monopolist and another, independent purchaser.")). Respondents raise this "antecedent transaction[s]" point over a dozen times, as if it were the Eighth Circuit's entire analysis. It is not. The phrase "one who bears some portion of a monopoly overcharge only by virtue of an antecedent transaction between the monopolist and another, independent purchaser" is simply a context-specific way of saying "one who claims a pass-through injury." The United States made this exact point in its *Campos amicus* brief.[1] Determining whether the plaintiff is claiming a pass-through injury is plainly an important part of an *Illinois Brick* analysis, if not the object of the exercise. For Respondents and the Ninth Circuit to say that one should not account for that, but should focus on the delivery of goods instead, clearly highlights the circuit split this decision creates.

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[1] Brief for the United States and the Federal Trade Commission as Amicus Curiae 14-15, *Campos v. Ticketmaster Corp.*, 525 U.S. 1102 (1999) (No. 98-127), https://www.justice.gov/sites/default/files/osg/briefs/1998/01/01/98-0127.ami.pet.inv.pdf (explaining that while "[t]he phrasing of that passage may lack some precision," it did not indicate "any departure from or extension of *Illinois Brick*").

3. ***The "Distributor Function" Rule.*** The petition explains how the Ninth Circuit's new "distributor function" rule lacks support in this Court's precedent, and in fact conflicts with them. Respondents' answer is to again deny what is plain on the face of the opinion. They contend that "the Ninth Circuit did not say or imply that its standing analysis began and ended with whether Apple functioned as a distributor." Opp. 7.

Passage after passage, the Ninth Circuit made clear that the appropriate *Illinois Brick* analysis, and its decision, turned entirely on Apple's function as a distributor of apps. In the paragraph that frames the issue, it stated:

> The question before us is whether Plaintiffs purchased their iPhone apps directly from the app developers, or directly from Apple. *Stated otherwise, the question is whether Apple is a manufacturer or producer, or whether it is a distributor.* Under *Hanover Shoe*, *Illinois Brick*, and *UtiliCorp*, if Apple is a manufacturer or producer from whom Plaintiffs purchased indirectly, Plaintiffs do not have standing. But *if Apple is a distributor from whom Plaintiffs purchased directly, Plaintiffs do have standing.*

Pet App. 17a. (emphasis added). The Ninth Circuit then said "[t]he key to the analysis is the function Apple serves," and took pains to explain that nothing else mattered: not "whether Apple sells distribution services to app developers," not the "payment or bookkeeping arrangements," not the "form of the payment Apple receives in return for distributing

iPhone apps," and not pricing mechanics or "who determines the ultimate price paid by the buyer of an iPhone app." Pet. App. 19a-21a. If there remained any doubt, the Ninth Circuit eliminated it by concluding that:

> Apple is a distributor of the iPhone apps, selling them directly to purchasers through its App Store. Because Apple is a distributor, Plaintiffs have standing under *Illinois Brick* to sue Apple for allegedly monopolizing and attempting to monopolize the sale of iPhone apps.

Id. at 21a.

4. ***The Role of Pass-Through and Duplicative Recovery.*** The petition details how the Ninth Circuit's focus on the marketplace function of distributing goods to consumers is indifferent to the pass-through, apportionment and double-recovery concerns that animate this Court's *Illinois Brick* case law and the relevant precedents of other circuits. The Ninth Circuit stated that it *did not matter* whether app developers might have a parallel cause of action to recover exactly the same 30% commissions as damages (trebled). Respondents are unable to defend those features of the Ninth Circuit's approach, so they attempt four obfuscation strategies.

First, Respondents assert that the Ninth Circuit "conclude[d] that apps purchasers were the direct victims of the monopolistic overcharge and that the damage was not passed on to them by the app developers or anyone else, but rather was imposed on them by Apple," and that therefore "there is no question that purchasers of apps first paid the

overcharge." Opp. 10. This bears no resemblance to anything the Ninth Circuit held. *See* Pet. App. 20a. Of course it is undisputed that Apple collects the full payment from consumers, remitting 70% of it to the developers, but the Ninth Circuit held that that is irrelevant. *See id.* ("We do not rest our analysis on the fact that Plaintiffs pay the App Store, which then forwards the payment to the app developers, less Apple's thirty percent commission."). It is also undisputed that developers set app prices, and do so against the backdrop that Apple will take a 30% commission. As a matter of basic economics, whether that commission will affect the price the developer otherwise would have charged (i.e., whether the developer will "pass through" or instead absorb the commission) depends on demand for that particular app and the substitutes available in the market. The Ninth Circuit could not and did not hold that there is no issue with pass-through dynamics or apportionment given the facts here; it ignored the issue altogether.

Respondents' second strategy is an elaborate and confusing effort to pretend that Apple is advancing a damages argument, not an *Illinois Brick* issue. *See* Opp. 10-12. This is not true. Apple has never argued, for example, that "absent the [alleged] monopoly [consumers] would have paid the same 30% commission to the apps developers." *Id.* at 10. Apple is focused on the way the world is: app developers set app prices knowing they will have to pay Apple a commission. They must therefore determine their own pass-through strategy, app-by-app. The decisions they make determine how consumers are affected by the commission and any allegedly supracompetitive component of it.

No one needs to figure that out if the developers sue, because they are the direct purchasers of the service. In developer litigation there is a *damages* issue—how much of the 30% commission is allegedly in excess of the competitive commission rate? But whatever that may be, the developers are entitled to 100% of it as direct purchaser damages, regardless of whether they absorbed it all or passed it on. That is what *Hanover Shoe, Inc. v. United Shoe Machinery Corp.* holds. *See* 392 U.S. 481, 489, 492 (1968). The problem here is that one *does* need to figure out the pass-through rate if consumers sue, because otherwise the damages estimates will be wrong. That is what *Illinois Brick* holds cannot happen—and why Respondents' claim is barred.

Respondents' third strategy is an effort to disenfranchise app developers from their claims. Opp. 12-13. There is nothing in this Court's *Illinois Brick* doctrine that permits indirect purchaser suits because those purchasers claim there are substantive defenses to direct purchaser claims. If anything, Respondents' effort to avoid duplicative litigation concerns by undermining the claims of another potential plaintiff group is a strong reminder of why we have an *Illinois Brick* doctrine.[2]

Finally, Respondents have no real answer to the Ninth Circuit's indifference to duplicative recoveries. The Ninth Circuit recognized that if "app developers are direct purchasers of distribution services from

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[2] We agree with Respondents that app developers benefit enormously from Apple's iPhone ecosystem, which may explain why no developer has brought a claim like this one. But by hypothesis, any developer who sued Apple would see things differently.

Apple," it "would necessarily imply that the developers, as direct purchasers of those services, could bring an antitrust suit" based on Apple's 30% commission. Pet. App. 20a. Nonetheless, the Ninth Circuit expressly held that "whether app developers are direct purchasers of distribution services from Apple in the sense of *Illinois Brick* makes no difference to our analysis." *Id.* The petition explained that the Ninth Circuit's indifference to that issue is an outright dismissal of the duplicative recovery concerns underlying *Illinois Brick*, stark enough to warrant summary reversal. Indeed, the decision appears to *invite* duplicative recovery.

Respondents discuss this passage only in a footnote, suggesting that the issue "would be determined by the court if and when the apps developers were to bring such a claim." Opp. 13 n.3. In text they suggest that there is no problem because any claim by the developers would be for "a piece of the same 30% pie." *Id.* at 12. Those are admissions that there *is* a potential for duplicative recovery, in which case two plaintiff groups would fight over "the same 30% pie." In other words, the court in that case (and therefore this one as well) would need to apportion the harm allegedly caused by Apple's commission between the developers and consumers. *See id.* at 12-13. But that exercise is the very thing that *Illinois Brick* places off limits, by mandating that the entire cause of action be placed in the hands of a single plaintiff—the direct purchaser.

Respondents' suggestion that apportionment would be manageable is precisely the position of the *Illinois Brick* dissent. *See* 431 U.S. at 761-65 (Brennan J., dissenting). But this Court disagreed, *see id.* at 731-32, and has since rejected arguments for exceptions to the

Illinois Brick rule when plaintiffs have argued that apportionment would, on the facts of a particular case, be manageable. *See Kansas v. UtiliCorp United Inc.*, 497 U.S. 199, 217 (1990). The settled law has been that the mere possibility of duplicative recoveries requires giving the entire claim to the direct purchasers. *See Lakeland Reg'l Med. Ctr., Inc. v. Astellas US, LLC*, 763 F.3d 1280, 1285 (11th Cir. 2014)) (direct purchaser rule intended to "eliminate[] the possibility ... [of] duplicative recoveries"); *Cohen v. Gen. Motors Corp. (In re New Motor Vehicles Canadian Export Antitrust Litig.)*, 533 F.3d 1, 5 (1st Cir. 2008) ("risk of duplicative recovery"); *Merican, Inc. v. Caterpillar Tractor Co.*, 713 F.2d 958, 967-68 (3d Cir. 1983) (*Illinois Brick* requires examining whether "allowing those persons to sue could create the possibility of duplicative recovery"), *cert. denied*, 465 U.S. 1024 (1984). The Ninth Circuit ignored that principle in order to ensure that end-consumers would always have a cause of action—again, precisely the position urged by Justice Brennan in dissent in *Illinois Brick*.

5. ***These Are Issues of National Importance.*** This case presents issues of national importance given the increasing prevalence of electronic commerce and the agency sales model. Many of the world's leading ecommerce companies are headquartered within the Ninth Circuit, and plaintiffs' attorneys will now have every incentive to file suit there. Thus, the Ninth Circuit has effectively established the contours of the "direct purchaser" doctrine as applied to electronic commerce for the entire country.

If that is in doubt, the Court should call for the views of the United States. The Solicitor General opined on these issues in *Campos*, stating that the

decision was correctly decided. Apple believes the United States would hold to the same position, disagree with the Ninth Circuit's decision, and find the issue worthy of immediate review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 19, 2017

No. 17-204

In the Supreme Court of the United States

APPLE INC., PETITIONER

v.

ROBERT PEPPER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether respondents can seek treble damages under Section 4 of the Clayton Act, 15 U.S.C. 15, based on their claim that Apple has monopolized the distribution of iPhone apps, where respondents were injured by Apple's conduct only to the extent that third-party app developers passed on Apple's allegedly supracompetitive commission in setting the prices that respondents paid.

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In the Supreme Court of the United States

No. 17-204

APPLE INC., PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

STATEMENT

Section 4 of the Clayton Act authorizes an award of treble damages to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. 15(a). In *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), this Court held that Section 4's treble-damages remedy is not available to a plaintiff who relies on a "pass-on theory" of injury—that is, an allegation that the antitrust violator unlawfully overcharged a third party, and that the third party then passed on the overcharge to the plaintiff. *Id.* at 736. This case concerns the application of the *Illinois Brick* rule to a Section 4 suit brought by purchasers of

iPhone apps who allege that Apple has unlawfully monopolized the market for iPhone app distribution.

1. Apple introduced the iPhone in 2007. Pet. App. 2a. Shortly thereafter, it launched the App Store, an electronic marketplace that allows users to download iPhone apps. *Ibid.* The available apps now include games, messaging services, web browsers, and a vast array of other programs. *Ibid.*; see *Riley* v. *California*, 134 S. Ct. 2473, 2490 (2014) ("[T]he phrase 'there's an app for that' is now part of the popular lexicon.").

Apple itself created some of the apps available in the App Store, but most were developed by third parties. Pet. App. 2a. Each third-party developer chooses the prices that will be charged for its apps in the App Store, and it can opt to make those apps available for free. *Id.* at 2a, 26a. If a developer decides to charge a price, Apple takes a 30% commission on each sale. *Id.* at 2a-3a. A user who purchases an app (or a license for an app) pays the full price to Apple. *Id.* at 2a-3a, 26a-27a. Apple retains 30% of that amount and remits the balance to the developer. *Id.* at 3a, 26a. Apple does not take ownership of third-party apps sold through the App Store, but instead acts as the developers' agent and completes the sales on their behalf. *Id.* at 20a.[1]

Apple intends the iPhone to be a "closed" system. Pet. App. 2a. Apple prohibits developers from selling iPhone apps directly to consumers, or from distributing apps through any channel other than the App Store. *Id.*

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[1] Because this case arises on a motion to dismiss, we describe the facts as alleged in respondents' complaint. Pet. App. 2a. To the extent the parties dispute what the complaint is fairly read to allege, we rely on the reading adopted by the district court and left undisturbed by the court of appeals. See Pet. Reply Br. 2-3.

at 3a. Apple also discourages iPhone users from installing apps obtained from other sources. *Ibid.*

2. Respondents are iPhone users who purchased apps through the App Store. Pet. App. 46a. In 2011, they filed this putative class action against Apple. *Id.* at 3a. Their operative complaint alleges that Apple violated Section 2 of the Sherman Act, 15 U.S.C. 2, by monopolizing the distribution of iPhone apps. Pet. App. 3a. Respondents further allege that Apple's 30% commission is supracompetitive, and that they "have been injured by Apple's anticompetitive conduct because they paid more for their iPhone apps than they would have paid" in a market in which developers could distribute apps through other channels. *Id.* at 53a. Along with other relief, respondents seek to recover three times the amount of the alleged overcharges under Section 4 of the Clayton Act. *Id.* at 63a.

The district court dismissed respondents' complaint, holding that their Section 4 claim is barred by *Illinois Brick*. Pet. App. 23a-37a. The court explained that, although respondents' allegations are somewhat unclear, their complaint "is fairly read to complain about a fee created by agreement" between Apple and third-party app developers under which the developers agree "to pay Apple 30% from their own proceeds." *Id.* at 36a. Accordingly, the court observed, Apple's 30% commission is "borne *by the developers*" in the first instance and then "passed-on to [users] as part of the purchase price" the developers set. *Ibid.* The court therefore held that respondents' damages claim rests on the type of pass-on theory that this Court disapproved in *Illinois Brick*. *Id.* at 36a-37a.

3. The court of appeals reversed. Pet. App. 1a-22a. As relevant here, the court held that respondents' claim

is not barred by *Illinois Brick* because Apple functions as a distributor of iPhone apps. *Id.* at 13a-21a.

The court of appeals began by reviewing this Court's decisions in *Illinois Brick*; in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968); and in *Kansas* v. *UtiliCorp United Inc.*, 497 U.S. 199 (1990). Pet. App. 13a-17a. The court explained that, in both *Illinois Brick* and *Hanover Shoe*, "a monopolizing or price-fixing manufacturer sold or leased a product to an intermediate manufacturer at a supracompetitive price," and the intermediate manufacturer "used that product to create another product, which was ultimately sold to the consumer." *Id.* at 16a. The court similarly characterized *UtiliCorp* as a case in which "a monopolizing producer sold a product to a distributor at an allegedly supracompetitive price," and "[t]he distributor then sold the product to the consumer." *Ibid.* The court of appeals read those decisions to establish a rule that consumers may not sue a "manufacturer or producer" with which they have no direct dealings, but may sue an "intermediary" with which they deal directly, whether that intermediary is an "intermediate manufacturer" or a "distributor." *Id.* at 17a.

Based on that understanding, the court of appeals framed the dispositive question in this case as "whether Apple is a manufacturer or producer, or whether it is a distributor." Pet. App. 17a. The court concluded that *Illinois Brick* does not bar respondents' suit because "Apple is a distributor of the iPhone apps, selling them directly to purchasers through its App Store." *Id.* at 21a.

The court of appeals identified several specific factors that did *not* affect its analysis. First, the court did not decide whether app developers could bring their own Section 4 suit seeking treble damages from Apple

based on the same allegedly supracompetitive commission that is at issue here. Pet. App. 20a. Second, the court did not rely on the fact that iPhone users pay Apple, "which then forwards the payment to the app developers." *Ibid.* The court explained that it would have reached the same result if users paid the entire purchase price directly to developers, and developers then separately paid Apple its commission. *Ibid.* Third, the court deemed it irrelevant that Apple receives a fixed commission, rather than "tak[ing] ownership of the apps and then sell[ing] them to buyers after adding a markup," as a traditional retailer would. *Ibid.* Fourth, the court considered it immaterial that the price for an app is determined "by the app developer" rather than by Apple. *Id.* at 21a.

The court of appeals thus emphasized that it "rest[ed] [its] analysis" solely on what it perceived to be "the fundamental distinction between a manufacturer or producer, on the one hand, and a distributor, on the other." Pet. App. 21a. The court framed its holding in those terms, concluding that "[b]ecause Apple is a distributor, [respondents] have standing under *Illinois Brick*." *Ibid.* The court acknowledged that the Eighth Circuit had reached the opposite result in a case "closely resembling" this one. *Id.* at 18a (discussing *Campos* v. *Ticketmaster Corp.*, 140 F.3d 1166 (1998), cert. denied, 525 U.S. 1102 (1999)). The court "disagree[d] with the [Eighth Circuit] majority's analysis," however, and instead endorsed the *Campos* dissent. *Id.* at 19a.

DISCUSSION

The Court should grant the petition for a writ of certiorari. The court below departed from this Court's precedents and created a circuit conflict by holding that respondents are entitled to seek treble damages under

Section 4 of the Clayton Act because Apple functions as a "distributor." Under the rule articulated in *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), the availability of a Section 4 claim does not depend on the defendant's functional role. Rather, the Court in *Illinois Brick* held that a plaintiff cannot state a claim for treble damages under Section 4 by relying on a "pass-on theory," *i.e.*, by alleging that the defendant unlawfully overcharged a third party and that the third party passed on all or part of the overcharge to the plaintiff. Because respondents' claim of injury is predicated on such an allegation, it is foreclosed by *Illinois Brick*. And in allowing respondents' treble-damages claim to go forward, the court of appeals rejected the Eighth Circuit's view on an important question of federal antitrust law. This Court should resolve that acknowledged conflict.

A. The Court Of Appeals Misapplied The *Illinois Brick* Rule

In *Illinois Brick*, this Court held that Section 4's treble-damages remedy is not available to a plaintiff who asserts that it paid more than it should have because a third party passed on the defendant's supra-competitive prices. Respondents' damages claim is barred by *Illinois Brick* because it rests on the assertion that third-party app developers would have set lower prices for their apps if Apple had charged a commission of less than 30%. The court of appeals did not dispute that respondents' claim necessarily rests on that pass-on theory. Instead, the court held that the *Illinois Brick* rule allows that sort of derivative claim to go forward because "Apple is a distributor from whom [respondents] purchased directly." Pet. App. 17a. That holding reflects a misunderstanding of this Court's decisions.

1. Under Illinois Brick, *a plaintiff cannot state a claim for treble damages under Section 4 of the Clayton Act by alleging that the defendant unlawfully overcharged a third party and that the third party passed on the overcharge to the plaintiff*

Section 4 of the Clayton Act provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor * * * and shall recover threefold the damages by him sustained." 15 U.S.C. 15(a). In three decisions articulating what has come to be known as the *Illinois Brick* rule, this Court has construed that language to prohibit the use of pass-on theories by both plaintiffs and defendants.

a. In *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968), the Court rejected an asserted pass-on defense to a Section 4 action. In that case, a shoe manufacturer (Hanover) sued a manufacturer of shoe-making machines (United), alleging that United had monopolized the market and had overcharged Hanover for the use of its machines. *Id.* at 483-484. The district court agreed and awarded Hanover three times the amount of the overcharge. *Id.* at 487. In this Court, United argued that Hanover had not been "injured in [its] business or property," 15 U.S.C. 15(a), because it had passed on the overcharge to its customers by increasing "the price charged for shoes." *Hanover Shoe*, 392 U.S. at 487-488. The Court rejected that pass-on defense as a matter of law, holding that a plaintiff that was unlawfully overcharged by an antitrust violator "is equally entitled to damages" even if it has passed on the overcharge to its own customers. *Id.* at 489. The Court gave two reasons for that holding.

First, the Court believed that establishing the extent to which a plaintiff had passed on the defendant's overcharge would entail "insurmountable" problems of proof and would impede the resolution of treble-damages actions with "massive evidence and complicated theories." *Hanover Shoe*, 392 U.S. at 493. The Court stated that "[a] wide range of factors influence a company's pricing policies," and that it would be difficult or impossible to determine whether a plaintiff had raised its prices because of the defendant's overcharge or for other reasons. *Id.* at 492. The Court also expressed the view that it would be "[e]qually difficult to determine" the extent to which such a price increase had been offset by a reduction in the plaintiff's sales. *Id.* at 493.

Second, the Court believed that permitting pass-on defenses would "substantially reduce[]" the deterrent effect of treble-damages suits. *Hanover Shoe*, 392 U.S. at 494. The Court recognized that the economic burden of an antitrust violation will often be borne by the "ultimate consumers" in the chain of distribution—in *Hanover Shoe*, retail consumers who had bought "single pairs of shoes." *Ibid.* But while acknowledging that those retail consumers in the aggregate might ultimately bear the brunt of the overcharge, the Court was concerned that each consumer would have "only a tiny stake in a lawsuit and little interest in attempting a class action." *Ibid.*

b. In *Illinois Brick*, the plaintiffs alleged that they had been "injured in [their] business or property" within the meaning of Section 4 when an illegal overcharge was passed on to them. 431 U.S. at 729. Illinois and a group of local governments sued manufacturers of concrete blocks, alleging that those manufacturers had fixed the prices charged to contractors and that the contractors

had passed on the overcharge to government entities in setting prices for construction work. *Id.* at 726-727. This Court held that, just as "a pass-on theory may not be used defensively by an antitrust violator" to reduce the damages owed to a "direct purchaser plaintiff" that had paid the violator's supracompetitive prices, such a theory may not be "used offensively by an indirect purchaser plaintiff" who alleges that it was overcharged when the violator's supracompetitive prices were passed on by intermediaries like the contractors in that case. *Id.* at 726; see *id.* at 736.

The *Illinois Brick* Court described *Hanover Shoe* as holding that "a direct purchaser suing for treble damages under [Section] 4 of the Clayton Act is injured within the meaning of [Section] 4 by the full amount of the overcharge paid by it," and that a defendant "is not permitted to introduce evidence that indirect purchasers were in fact injured by the illegal overcharge" because the direct purchaser passed it on by increasing its own price. *Illinois Brick*, 431 U.S. at 724-725. The Court then held that an indirect-purchaser plaintiff is similarly barred from predicating a Section 4 claim on an allegation that unlawful overcharges were passed on to it. The Court explained that "allowing offensive but not defensive use of pass-on would create a serious risk of multiple liability for defendants," who could be held liable to both direct and indirect purchasers for the same overcharge. *Id.* at 730. The Court added that the "principal basis" for its decision in *Hanover Shoe* had been the desire to avoid pass-on inquiries that would "greatly complicate and reduce the effectiveness of already protracted treble damages proceedings." *Id.* at 731-732. The Court concluded that this concern "ap-

plies with no less force to the assertion of pass-on theories by plaintiffs than it does to the assertion by defendants." *Id.* at 732.

Having held that offensive and defensive uses of pass-on analysis should stand or fall together, this Court stated that the *Illinois Brick* plaintiffs could not "recover on their pass-on theory" unless the Court "overrule[d] *Hanover Shoe*." 431 U.S. at 736. The Court declined to take that step. The Court stated that "[p]ermitting the use of pass-on theories under [Section] 4 essentially would transform treble-damages actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge," ranging "from direct purchasers to middlemen to ultimate consumers." *Id.* at 737. The Court concluded that, "[h]owever appealing this attempt to allocate the overcharge might seem in theory, it would add whole new dimensions of complexity to treble-damages suits." *Ibid.*

c. In *Kansas* v. *UtiliCorp United Inc.*, 497 U.S. 199 (1990), public utilities sued natural-gas producers and a natural-gas pipeline company, alleging that those entities "had conspired to inflate the price of their gas in violation of the antitrust laws." *Id.* at 204. Kansas and Missouri sued the same defendants on behalf of residents who had purchased gas from the utilities, alleging that the utilities had passed on the overcharges by increasing their state-regulated gas prices. *Id.* at 204-205. The States argued that the Court should make an exception to the *Illinois Brick* rule for cases "involving regulated public utilities that pass on 100 percent of their costs to their customers." *Id.* at 208.

This Court declined to create that exception. It acknowledged that "[t]he rationales underlying *Hanover Shoe* and *Illinois Brick* will not apply with equal force in all cases," and that establishing the extent to which a direct purchaser has passed on an overcharge may be easier in some circumstances than in others. *UtiliCorp*, 497 U.S. at 216. The Court declined, however, to "carve out exceptions" for "particular types of markets." *Ibid.* (quoting *Illinois Brick*, 431 U.S. at 744). The Court explained that "[t]he possibility of allowing an exception, even in rather meritorious circumstances, would undermine the rule," *ibid.*, because the "process of classifying various market situations according to the amount of pass-on likely to be involved and its susceptibility to proof in a judicial forum would entail the very problems" that the *Illinois Brick* rule was adopted to avoid, *ibid.* (quoting *Illinois Brick*, 431 U.S. at 744-745).[2]

d. Although the *Illinois Brick* rule bars both offensive and defensive uses of pass-on analysis in treble-damages suits under Section 4, the rule is limited in two important respects.

First, the *Illinois Brick* rule does not apply to suits seeking injunctive relief under Section 16 of the Clayton Act, 15 U.S.C. 26. This Court's decisions disapproving the use of pass-on theories under Section 4 do not speak

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[2] This Court has left open the possibility of exceptions to the *Illinois Brick* rule in certain narrow circumstances. Those include cases in which "the direct purchaser is owned or controlled by its customer," and cases where "a pre-existing cost-plus contract" ensures that "the purchaser is insulated from any decrease in its sales as a result of attempting to pass on the overcharge." *Illinois Brick*, 431 U.S. at 736 & n.16; see *UtiliCorp*, 497 U.S. at 217-218. Those potential exceptions are not at issue in this case.

to whether particular conduct by defendants violates the antitrust laws; they are instead rooted in concerns specific to monetary relief. Suits by indirect purchasers seeking only injunctive relief do not raise the same concerns about "duplicative recovery" and "the complexity of apportioning damages." *Cargill, Inc.* v. *Monfort of Colo., Inc.*, 479 U.S. 104, 111 n.6 (1986); see, *e.g.*, *Campos* v. *Ticketmaster Corp.*, 140 F.3d 1166, 1172 (8th Cir. 1998), cert. denied, 525 U.S. 1102 (1999); *McCarthy* v. *Recordex Serv., Inc.*, 80 F.3d 842, 856 (3d Cir.), cert. denied, 519 U.S. 825 (1996).

Second, in the decades since *Illinois Brick* was decided, more than two-thirds of the States have allowed the use of pass-on analysis to apportion damages under their own antitrust laws, which otherwise generally parallel federal law. See Antitrust Modernization Commission, *Report and Recommendations* 268-269 (Apr. 2007) (*AMC Report*). This Court has held that those state laws are not preempted because the *Illinois Brick* rule "defin[es] what sort of recovery federal antitrust law authorizes" and does not "defin[e] what federal law allows States to do under their own antitrust law." *California* v. *ARC Am. Corp.*, 490 U.S. 93, 103 (1989). As a result, antitrust defendants now often face parallel damages actions brought by both direct purchasers (who sue under Section 4 of the Clayton Act) and indirect purchasers (who sue under state laws that authorize pass-on claims). *AMC Report* 269.

That regime of parallel federal and state antitrust litigation has proved to be complex and inefficient. See *AMC Report* 269-272. *Inter alia*, suits by direct and indirect purchasers seeking to recover the same overcharge create a risk of inconsistent results or duplica-

tive awards. *Id.* at 271-272. In addition, some commentators have concluded, based on the courts' experience with state-law indirect-purchaser claims, that the evidentiary complexities associated with pass-on analysis are not as great as this Court believed them to be when it decided *Hanover Shoe* and *Illinois Brick*. See, *e.g.*, *id.* at 277; 2A Phillip E. Areeda et al., *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 346k, at 219-227 (4th ed. 2014). The parties have litigated this case within the framework established by *Hanover Shoe* and *Illinois Brick*, however, and have not asked this Court to revisit those decisions.

***2. Respondents' treble-damages claim is barred by* Illinois Brick**

Respondents' complaint does not state a valid treble-damages claim under Section 4 because it is premised on the same sort of pass-on allegations that this Court found insufficient in *Illinois Brick*. Respondents allege that Apple monopolized the "distribution market for iPhone apps." Pet. App. 56a. They further allege that they "have been injured by Apple's anticompetitive conduct because they paid more for their iPhone apps than they would have paid" if developers had been allowed to sell their apps through other channels. *Id.* at 53a. According to respondents, the availability of alternative distribution channels would have forced Apple "to substantially lower its 30% [commission]," which would have led to lower app prices. *Id.* at 55a.

As the district court explained, respondents' asserted injury depends on a pass-on theory because the prices in the App Store are set by third-party app developers, not by Apple. Pet. App. 36a. When a developer that would otherwise price its app at $7 confronts Apple's 30% commission, it can increase the price to

$10, passing on the full amount of the commission to the customer, but losing sales. It can leave the price at $7, preserving sales volume but absorbing the entire commission itself. Or (in the most likely scenario) it can charge a price between $7 and $10 and pass on some but not all of Apple's commission.

The extent (if any) to which app purchasers are injured by Apple's allegedly supracompetitive commission, and by its refusal to allow developers to sell iPhone apps through other channels, thus depends on whether those Apple practices have caused developers to increase the prices charged for their apps in the App Store. To determine whether third-party app developers would have charged lower prices in a hypothetical market in which they were freed from Apple's allegedly unlawful practices, a court would need to conduct precisely the sort of pass-on analysis that the Court in *Illinois Brick* rejected. The district court therefore was correct in holding that respondents' treble-damages claim is barred by the *Illinois Brick* rule.[3]

3. *The court of appeals' analysis reflects a misreading of* Illinois Brick

The court of appeals "rest[ed] [its] analysis" on what it called "the fundamental distinction between a manufacturer or producer, on the one hand, and a distributor,

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[3] The district court dismissed respondents' complaint based on its holding that *Illinois Brick* bars their treble-damages claim. Pet. App. 37a. The complaint also includes a request for injunctive relief, *id.* at 63a, which respondents argued on appeal should be allowed to proceed even if their treble-damages claim cannot, Resps. C.A. Br. 53-54; see pp. 11-12, *supra*. The court of appeals had no occasion to address that argument, which will remain open on remand if this Court grants review and holds that *Illinois Brick* forecloses respondents' treble-damages claim.

on the other." Pet. App. 21a. The court held that respondents' Section 4 suit may proceed "[b]ecause Apple is a distributor" that sold iPhone apps "directly" to respondents. *Ibid.* That holding reflects a fundamental misunderstanding of the *Illinois Brick* rule.

a. The court of appeals observed that *Hanover Shoe*, *Illinois Brick*, and *UtiliCorp* all involved similar distribution chains, through which a manufacturer or producer sold or leased a product to an intermediate manufacturer or distributor, which either resold that product or used it to make the product that was sold to consumers (sometimes through other intermediaries). Pet. App. 16a. In *Hanover Shoe*, United leased shoe-making machines to Hanover, which used them to make shoes that were ultimately sold to retail customers. 392 U.S. at 483-484. In *Illinois Brick*, manufacturers of concrete blocks sold them to contractors, who used the blocks in providing construction services to Illinois and its local governments. 431 U.S. at 726. And in *UtiliCorp*, the natural-gas producers and pipeline company sold gas to utilities, which resold it to consumers. 497 U.S. at 204.

The court of appeals correctly recognized that, under this Court's decisions, the ultimate consumers in those three distribution chains could not bring Section 4 actions against the original manufacturers or producers, but could have sued the intermediate manufacturers or distributors with which they transacted if those intermediaries had violated the antitrust laws. Pet. App. 16a-17a. In *Illinois Brick*, for example, Illinois could not sue the allegedly price-fixing manufacturers of concrete blocks, but could have sued the general contractors if those contractors had conspired to fix the prices they charged the State for construction work.

The court of appeals went astray, however, in attempting to derive the governing legal rule from the particular facts of *Hanover Shoe*, *Illinois Brick*, and *UtiliCorp*, rather than from the stated rationale for this Court's holdings. This Court's decisions have neither recognized nor relied upon any "fundamental distinction between a manufacturer or producer * * * and a distributor." Pet. App. 21a. Instead, the Court has held that, in resolving questions of treble-damages liability under Section 4, courts should not attempt to determine whether the entity that paid an unlawful overcharge to the antitrust violator passed on that overcharge to others. In *Hanover Shoe*, the Court held that a Section 4 defendant is "not entitled to assert a passing-on defense." 392 U.S. at 494. In *Illinois Brick*, the Court again framed the question presented as concerning the "permissibility of pass-on arguments," and it extended *Hanover Shoe* to bar "the use of pass-on theories by plaintiffs" as well as by defendants. 431 U.S. at 731, 737. The *Illinois Brick* Court repeatedly recognized that the rule it applied precludes "the use of pass-on theories under [Section] 4." *Id.* at 737; see, *e.g.*, *id.* at 732, 745, 747.

In *Hanover Shoe*, *Illinois Brick*, and *UtiliCorp*, the consumers would not have needed to use pass-on theories in suits against the distributors or other intermediaries with which they transacted because those intermediaries set the prices the consumers paid. But this case is different. Although Apple acts as an intermediary or distributor, it does not buy apps from app developers and then resell them to consumers at prices of its choosing. Pet. App. 20a. Instead, it acts as an agent for the developers, completing sales on the developers' behalf at prices the developers set. *Id.* at 20a-21a, 36a.

That difference is critical to the proper application of the *Illinois Brick* rule. Respondents' claim of injury depends on the assertion that Apple's allegedly unlawful conduct caused developers to set App Store prices at levels higher than the developers otherwise would have chosen. That is at bottom an allegation of pass-on injury, even though Apple acts as an intermediary between app developers and consumers and has contractual relationships with both.

b. By focusing solely on Apple's status as a distributor, the court of appeals effectively mandated the inquiry that the *Illinois Brick* Court sought to avoid. To prove damages, respondents would need to establish the extent to which Apple's allegedly unlawful practices have caused developers to set higher prices for their apps than they otherwise would have. That is precisely the pass-on inquiry this Court has disapproved. See *Illinois Brick*, 431 U.S. at 737, 743; *Hanover Shoe*, 392 U.S. at 492-493.

Respondents appear to acknowledge (Br. in Opp. 11) that Apple could seek to reduce any damages award by showing that a lower commission would not have resulted in lower app prices. But respondents assert (*ibid.*) that those issues "relating to the measure and amount of damages" are not relevant to the application of *Illinois Brick*. That is incorrect. In fact, the square holding of *Illinois Brick* is that courts in Section 4 cases should not conduct what this Court deemed to be unacceptably complicated inquiries about how to "apportion the recovery" among the various parties in the chain of distribution. *Illinois Brick*, 431 U.S. at 737.

c. Respondents do not appear to defend the court of appeals' distributor-function rule. Consistent with the opinion below, however, respondents argue that they

qualify as "direct purchasers" under *Illinois Brick* because they bought iPhone apps "directly" from Apple. Pet. App. 21a-22a; see Br. in Opp. i, 6, 11. That argument is unpersuasive for two related reasons.

First, the term "direct purchaser" as used in *Illinois Brick* must be understood in light of this Court's holding that Section 4 does not permit "the use of pass-on theories." *Illinois Brick*, 431 U.S. at 737. In *Illinois Brick* and *UtiliCorp*, the Court used the term "direct purchaser" to describe a party that bears an antitrust violator's unlawful overcharge in the first instance, and the term "indirect purchaser" to describe a party that bears such an overcharge only to the extent it is passed on by others. See, *e.g.*, *UtiliCorp*, 497 U.S. at 206-208; *Illinois Brick*, 431 U.S. at 724-726. The Court has consistently focused on the evidentiary complexities and other problems associated with pass-on analysis—not on "directness" in any other sense. And the Court's opinion in *Hanover Shoe*—the source of the *Illinois Brick* rule—did not use the terms "direct purchaser" and "indirect purchaser" at all.

Second, this Court has used the term "direct purchaser" not to encompass every party that had some direct dealings with the monopolist, but rather to describe the party that first purchased *the monopolized good or service*. Respondents do not fit that description. Respondents allege that Apple has monopolized the "distribution market for iPhone applications." Pet. App. 41a; see *id.* at 43a, 48a-49a, 56a. But although respondents and other iPhone users deal directly with Apple in purchasing *apps* through the App Store, they are not direct purchasers of Apple's *app-distribution services*. Instead, app developers purchase those services from Apple in the first instance by entering into contracts in

which Apple agrees to distribute their apps in exchange for 30% of the proceeds from each sale. *Id.* at 36a.

This case is thus analogous to *Hanover Shoe*. Just as shoe-making machines were a "necessary input" for Hanover and other shoe manufacturers, *Campos*, 140 F.3d at 1171, distribution services are a necessary input for app developers' sales of their apps to the public. If, as respondents allege, Apple has monopolized the market for distribution services, the immediate consequence is that developers cannot obtain those services elsewhere and must instead acquire them on Apple's terms—that is, by agreeing to pay Apple's 30% commission. Any increase in the app prices charged to iPhone users like respondents is a result of app developers' decisions to pass on all or part of that commission in setting their prices.

Respondents and other iPhone users are thus "indirect purchasers" as the *Illinois Brick* Court used that term. Those consumers "only buy [Apple's distribution] services because [app developers] have been required to buy those services first," *Campos*, 140 F.3d at 1171, and they bear the cost of Apple's 30% commission only to the extent that developers choose to pass it on. As the Eighth Circuit explained, "such derivative dealing is the essence of indirect purchaser status." *Ibid.*

B. The Decision Below Conflicts With The Eighth Circuit's Decision In *Campos*

The court of appeals correctly recognized that its decision conflicts with the Eighth Circuit's decision in *Campos*, a case "closely resembling" this one. Pet. App. 18a.

1. In *Campos*, purchasers of concert tickets sued Ticketmaster, alleging that it was "a monopoly supplier of ticket distribution or ticket delivery services to large-scale popular music shows." 140 F.3d at 1168. As in this case, the plaintiffs alleged that Ticketmaster had used

its monopoly position to extract "supracompetitive fees," which were set in contracts between Ticketmaster and concert venues. *Id.* at 1169. And as in this case, Ticketmaster functioned as a distributor and dealt directly with the plaintiffs, who paid both the nominal ticket prices and the added fees "directly to Ticketmaster." *Id.* at 1171.[4]

The Eighth Circuit held that the plaintiffs' claim was barred by *Illinois Brick* because it rested on the assertion that concert venues were passing on Ticketmaster's fees in setting their ticket prices (which determined the total price that concertgoers actually paid). *Campos*, 140 F.3d at 1171-1172. The court explained that concert venues would be free to raise nominal ticket prices if Ticketmaster lowered its fees, and that determining the extent of the plaintiffs' injury from Ticketmaster's allegedly supracompetitive fees therefore would require the sort of pass-on analysis that *Illinois Brick* precludes. *Ibid.*

If respondents' suit had been brought in the Eighth Circuit, it would have been foreclosed by *Campos*. Conversely, the court of appeals in this case "disagree[d]" with the Eighth Circuit's approach and made clear that it would have reached the opposite result if it had been presented with the facts of *Campos*. Pet. App. 19a. Like Apple, Ticketmaster functioned as a "distributor" and dealt directly with the plaintiffs. It therefore would have been subject to a Section 4 treble-damages suit under the court of appeals' conception of the *Illinois Brick* rule.

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[4] Unlike Apple's commission, Ticketmaster's fees were separately identified as additions to the nominal ticket price. *Campos*, 140 F.3d at 1169, 1171.

2. Respondents assert (Br. in Opp. 14) that, although the court of appeals criticized the Eighth Circuit's decision in *Campos*, "[t]he difference in outcomes in the two cases" stems from "different factual allegations" rather than from any legal disagreement. But the court of appeals emphasized that it "d[id] not rest [its] analysis" on the specifics of respondents' allegations or on the details of the App Store's operations. Pet. App. 20a. Instead, the court held that *Illinois Brick* does not prohibit consumers from suing "a distributor" with which they dealt "directly," even if their asserted injury depends on an allegation that an unlawful overcharge imposed on a third party was passed on to them. *Id.* at 21a. That legal holding is incorrect and squarely conflicts with the Eighth Circuit's decision in *Campos*.

C. The Question Presented Warrants This Court's Review

Although the circuit conflict created by the court of appeals' decision is shallow and recent, it nonetheless warrants this Court's review. The application of the *Illinois Brick* rule to agency or consignment sales models like Apple's will significantly affect the private enforcement of federal antitrust law, in part because other existing and emerging e-commerce platforms use similar models. See Pet. 29-31. The importance of the question presented will only grow as commerce continues to move online. The Ninth Circuit is home to a disproportionate share of the Nation's e-commerce companies, and its erroneous decision creates uncertainty and a lack of uniformity about the proper application of Section 4 to this increasingly common business model. This Court should grant certiorari and correct the Ninth Circuit's error.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 17-204

IN THE

Supreme Court of the United States

APPLE INC.,

Petitioner,

v.

ROBERT PEPPER, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICUS CURIAE* ACT THE APP ASSOCIATION IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Amici curiae, ACT | The App Association ("App Association"), respectfully moves for leave to file the attached brief in support of the Petition for a Writ of Certiorari. Amici timely notified counsel for Petitioners and Respondents of their intent to file a brief in support of Petitioners and requested counsel's consent to the filing of the brief. Petitioners' counsel consented to Amici filing their brief. Respondents' counsel advised Amici that they opposed the request.

The App Association is an international grassroots advocacy and education organization representing more than 5,000 small app[1] developers and technology firms. It is the only organization focused on the needs of small business innovators from around the world. The App Association advocates for an environment that inspires and rewards innovation while providing resources to help its members leverage their intellectual assets to raise capital, create jobs, and continue innovating.

The App Association has participated as an *amicus curiae* to the Supreme Court and other courts in cases related to antitrust and technological innovation. *See, e.g.*, *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014); *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003); *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc) (per curiam).

---

1. An app is shorthand for application: in today's parlance, it refers most commonly to software applications running on mobile devices.

Technological innovation plays a critical role for our members and improving the welfare of consumers; therefore, the App Association has a keen interest in ensuring federal antitrust law is properly applied to the dynamic industries and innovative technologies that drive the app ecosystem. The App Association's members utilize app platforms to distribute innovative products and services to billions of their customers around the globe. If the Ninth Circuit's ruling stands, it will directly impact developers' ability to provide their services by breaching the viability of the agency-sale relationship with app platforms and sovereignty of our members' property within their app. Accordingly, the App Association respectfully requests leave to file a brief in support of Petitioners.

Dated: September 6, 2017

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*[1]

ACT | The App Association ("App Association") is an international grassroots advocacy and education organization representing more than 5,000 small app[2] developers and technology firms. It is the only organization focused on the needs of small business innovators from around the world. The App Association advocates for an environment that inspires and rewards innovation while providing resources to help its members leverage their intellectual assets to raise capital, create jobs, and continue innovating.

The App Association has participated as an *amicus curiae* to the Supreme Court and other courts in cases related to antitrust and technological innovation. *See, e.g., Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014); *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003); *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc) (per curiam). Technological innovation plays a critical role for our members and improving the welfare of consumers; therefore, the App Association has a keen interest in ensuring federal antitrust law is properly applied to the

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1. Pursuant to Rule 37.6, amicus affirms that no counsel for a party authored this brief in whole or in part and that no person other than amicus and its counsel made a monetary contribution to its preparation or submission. Petitioner provided written consent in this appeal on August 22, 2017, and respondent has refused to provide its consent to the filing of this brief. The Petitioner's consent has been filed with the Clerk's office.

2. An app is shorthand for application: in today's parlance, it refers most commonly to software applications running on mobile devices.

dynamic industries and innovative technologies that drive the app ecosystem. The App Association's members utilize app platforms to distribute innovative products and services to billions of their customers around the globe. If the Ninth Circuit's ruling stands, it will directly impact developers' ability to provide their services by breaching the viability of the agency-sale relationship with app platforms and sovereignty of our members' property within their app.

SUMMARY OF ARGUMENT

The App Association urges the Court to grant the Petitioner's petition for cert on the basis that the Respondent's case relies on the Ninth Circuit's misguided assumption that a consumer's purchase of an app through the Petitioner's platform constitutes a direct purchase from the Petitioner exclusively; instead, the Petitioner provides a platform which facilitates our ability to sell our apps to customers. As an association that represents actual app companies that utilize the iTunes, Google Play, and other distribution channels/platforms, we find the Respondent's characterization of the relationship between platforms and app developers to be factually inaccurate and self-serving. App companies choose the distribution mechanism or platforms, choose the pricing, and even the monetization methodology for their applications. In fact, roughly 90 percent of apps made available on the iOS platform[3] are free. Sarah Perez, *Paid Apps on the Decline: 90% of iOS Apps Are Free, Up From 80-84% During 2010-2012, Says Flurry*, TechCrunch (Jul. 18,

3. This brief uses this term to describe Petitioner's operating system and platform.

2013), https://techcrunch.com/2013/07/18/paid-apps-on-the-decline-90-of-ios-apps-are-free-up-from-80-84-during-2010-2012-says-flurry/.

The Petitioner issues a 30 percent fee on apps that have an upfront cost or provide in-app purchases. In the context of a subscription, for each year thereafter, the fee is lowered to 15 percent, yielding an 85 percent profit for the app developer. Apple, *App Store Review Guidelines* (last visited Aug. 29, 2017), https://developer.apple.com/app-store/review/guidelines/#payments (App Store Guidelines). For that fee, our member companies benefit by reducing costs, including credit card collection record maintenance, third-party validation and other trust mechanisms, including hiring external publishers, and finally a trusted framework for consumers. In this case, the Respondent has attempted to apply "old" economy principles without appreciating the complex and nuanced relationship between app developers and platforms.

Moreover, the Ninth Circuit's interpretation of consumers as direct buyers from the Petitioner incorrectly assumes the Petitioner possesses ownership rights in app developers' apps. This interpretation suggests that, if the Petitioner owns rights to an app developer's app, then the app developer would not be entitled to any profit from the consumer. This is wholly inconsistent with the way in which the app developer and the Petitioner interact. Within this relationship, the Petitioner is only entitled to the agreed upon percentage of the app developers' app fee in exchange for the use of the Petitioner's platform. Aside from this fee, the Petitioner has no ownership rights to the app. In addition, app developers are permitted to provide their apps on platforms not owned by the Petitioner,

unencumbered by the Petitioner. All creative rights solely belong to the app developer and are uninhibited by the Petitioner. Moreover, when a consumer signs a "terms of service agreement" for each app he or she purchases, the app's developer maintains sole responsibility for any breach of those terms.

ARGUMENT

I. App Stores and Small Business App Developers Rely on Procompetitive Agency Sale Relationships with App Stores to Succeed in the Market

The app ecosystem has developed alongside the rise of the smartphone and has experienced substantial growth in its less than ten years of existence. As outlined in our annual State of the App Economy report, small-business entities are leaders in the $143 billion app ecosystem that has revolutionized the software industry and influenced every sector of the economy. Brian Scarpelli, Nick Miller, & Roya Stevens, *State of the App Economy*, ACT | THE APP ASSOCIATION (2017) http://actonline.org/wp-content/uploads/App_Economy_Report_2017_Digital.pdf. To facilitate the rise of the internet of things (IoT), an encompassing concept where everyday products use the internet to share data collected from sensors, trusted and curated app stores will be vital to providing the apps that serve as the interface for IoT devices. The opportunities and potential for IoT will hinge on the app economy's continued innovation, investment, and growth.

The inaccurate reasoning of the Ninth Circuit asserts ambiguity as to from whom the consumer is buying. When purchasing apps from any platform, the consumer is the

app developer's customer, not the platform's. We proffer a descriptive account on how platforms have served as a helpful access point for our members in reaching their customers to best establish this point. When mobile apps first became available, there were not centralized, organized platforms where consumers could easily find and discover their desired app. App developers had to perform myriad tasks before bringing their product to market. Developers not only had to write the code for the app itself, but they also had contract for or develop their own website, hire third-parties to handle financial exchanges, including credit card transactions, and work with contracted services, potentially including publishing houses on promotions and advertisements to build up consumer trust in their respective product. All of these steps cost our members time and money – and, more importantly, were not core competencies. Today, app developers use platforms as a one-stop shop to handle distribution and any collection of any charges and this enables app companies to access consumers more easily, while still maintaining the ownership of their products and maintain a relationship with our customers. Thus, platforms serve as an incredible, resource-saving alternative to other modes of interaction with consumers (*e.g.*, the World Wide Web).

Beyond the benefit for our membership directly, the App Association has long believed that agency-sale relationships are procompetitive arrangements that lower costs for consumers. They allow independent app developers to set their prices based on their business models, while allowing the app platform to retain a nominal fee for providing app developers with access to a broad set of customers, promoting a virtuous cycle of innovation.

Brief for ACT | The App Association as Amicus Curiae, p. 11, *Apple, Inc. v. U.S.*, Case No. 15-565 (2015). The agency-sale approach gives independent app developers autonomy and flexibility in how they offer their apps to consumers, whether it be free with in-app purchases, subscription-based sales, one-time purchase, etc. *See* App Store Guidelines. Successful platforms, like Apple's iOS, have changed the app ecosystem by providing app developers with ubiquitous access to a broader swath of consumers and platform users. This scenario has led to a flourishing app economy that has greatly benefited our members. Chuck Jones, *Apple's App Store Generating Meaningful Revenue*, Forbes (Jan. 6, 2017, 2:10 PM), https://www.forbes.com/sites/chuckjones/2017/01/06/apples-app-store-generating-meaningful-revenue/#305d93011eb6 (reporting developers receiving $20 billion in revenue).

The Respondent's allegation that the Petitioner is making app developers set a price for the consumers who purchase their apps through the iOS platform is just not true. As an association that represents actual developers who rely on iOS, we find this characterization to be factually inaccurate and self-serving. App companies choose the distribution mechanism or platforms, choose the pricing, and even the monetization methodology for their applications. In fact, roughly 90 percent of apps made available on the iOS platform are free. Sarah Perez, *Paid Apps on the Decline: 90% of iOS Apps Are Free, Up From 80-84% During 2010-2012, Says Flurry*, TechCrunch (Jul. 18, 2013), https://techcrunch.com/2013/07/18/paid-apps-on-the-decline-90-of-ios-apps-are-free-up-from-80-84-during-2010-2012-says-flurry/. The Petitioner issues a 30 percent fee on apps that have an upfront cost or provide in-app purchases. In the context of a subscription, for each

year thereafter, the fee is lowered to 15 percent, yielding an 85 percent profit for the app developer. *See* App Store Guidelines. For that fee, our member companies benefit by reducing costs, including credit card collection record maintenance, third-party validation and other trust mechanisms, including hiring external publishers, and finally a trusted framework for consumers. In this case, the Respondent has effectually attempted to apply "old" economy principles without appreciating the complex and nuanced relationship between app developers and platforms.

The Respondent's attacks on the agency model is based on inaccurate information, and ignores the widespread benefits of app developers to app stores, and vice versa. Moreover, if the Respondent's suggestions are implemented it would create a utility-style regulation of pricing without action from Congress. This action would force app developers to absorb the costs of operating on the App Store, ultimately resulting in higher prices for consumers. The Respondent's course of action produces losers at each stage – both app developers who lose flexibility in their business models and may be forced to absorb the cost of higher fees, as well as consumers who are presented with fewer choices and higher prices of apps in the App Store marketplace.

II. The Ninth Circuit's Interpretation of the Functional Approach of the Direct Sellers Rule Inappropriately Conflates Digital and Traditional Retail Markets by Assuming Petitioner Has Property Rights in App Developers' Products

The Ninth Circuit's decision at issue before this Court radically expanded the eligible parties that may seek antitrust class action relief against digital commerce companies that utilize the agency sales approach by appearing to incorrectly assume that the Petitioner possessed a property right in an app developer's product. *Pepper v. Apple Inc. (In re Apple iPhone Antitrust Litigation)*, 846 F.3d 313 (9th Cir. 2017). Under Section 4 of the Clayton Act, "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue...and shall recover threefold the damages by him sustained." 15 U.S.C. § 15(a). By virtue of the clause "any person," courts may apply the statute broadly. However, *Illinois Brick* limited that definition by only permitting courts to grant antitrust standing under Rule 12(b)(6) if the plaintiff is the direct purchaser of the company that overcharged as opposed to "others in the chain of manufacture or distribution." *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 729 (1977).

The essential question before the Ninth Circuit was whether the Respondent, when buying apps, was directly purchasing the app from the developer or the Petitioner. The court argued that because the Petitioner presented the final price and consumers could only purchase the app through the App Store, the Petitioner was the direct seller. In response, the Petitioner argued that it does not sell apps but rather sells "software distribution services"

to developers. *Pepper*, 846 F.3d at 323. The courts dismissed this claim, arguing that app developers do not have their own stores to sell their product. This is both technologically and factually inaccurate. The majority of our members have applications that run on multiple platforms, and with the advent of web-based applications, we have the opportunity to write for any device, regardless of platform or store.

The Ninth Circuit's interpretation of consumers as direct buyers from the Petitioner incorrectly assumes the Petitioner possesses ownership rights in app developers' apps to get to its conclusion. This interpretation suggests that if the Petitioner owns rights to an app developer's app, then the app developer would not be entitled to any profit from the consumer. This is wholly inconsistent with the way in which the app developer and the Petitioner interact. Within this relationship, the Petitioner is only entitled to the agreed upon percentage of the app developers' app fee. Aside from this fee, the Petitioner has no ownership rights to the app. In addition, app developers are permitted provide their apps on platforms not owned by the Petitioner, unencumbered by the Petitioner. All creative rights solely belong to the app developer and are uninhibited by the Petitioner. Moreover, when a consumer signs a "terms of service" for each app he or she purchases, the app's developer maintains sole responsibility for any breach of those terms.

The district court accurately stated that the *Illinois Brick* decision requires a careful evaluation of whether a plaintiff is claiming a harm based on direct interactions or pass-through damages. Put another way, the court must evaluate who sets the price. This case challenges

the nature of the relationship between the app developer and the purchaser of the app. The App Association agrees with the district court's determination that "any injury to Plaintiffs is an indirect effect resulting from the [influence of Petitioner's commission on the] software developers' own costs," which could not be litigated without "speculat[ing] into developers' pricing structure, their costs, ability to find a distribution chain, and/or desired profits or rates of return."

CONCLUSION

For the aforementioned reasons, we respectfully ask the Court to grant the Petitioner's application for certiorari.

Dated: September 6, 2017

Respectfully submitted,

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RECORD AND BRIEFS

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No. 17-204

IN THE

Supreme Court of the United States

APPLE, INC.,

Petitioner,

v.

ROBERT PEPPER, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2 of the Rules of this Court, the Washington Legal Foundation (WLF) respectfully moves for leave to file the attached brief as *amicus curiae* in support of Petitioner. Counsel for Petitioner has consented to the filing of this brief. Counsel for Respondents did not respond to a request for consent. Accordingly, this motion for leave to file is necessary.

The Washington Legal Foundation is a public interest law firm and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law. To that end, WLF has appeared frequently in this Court to address the proper scope of the federal antitrust laws. *See, e.g., FTC v. Actavis*, 133 S. Ct. 2223 (2013); *Texaco, Inc. v. Dagher*, 547 U.S. 1 (2006); *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199 (1990).

WLF is concerned that the decision below greatly expands the potential for antitrust class actions against companies involved in ecommerce and other forms of agency selling. The Ninth Circuit has fundamentally changed this Court's "direct purchaser" doctrine in a manner that will significantly complicate antitrust litigation and will expose numerous companies to claims for duplicative recoveries. WLF seeks to file its brief in order to explain why that change is inconsistent with the purposes underlying the "direct purchaser" doctrine.

WLF is also concerned that the decision below is

inconsistent with the fundamental purpose of antitrust laws: to promote competition. By substantially increasing the exposure to antitrust liability of companies that aggressively enter new markets and provide consumers with innovative products, the Ninth Circuit decision threatens to chill the very sorts of activities that the antitrust laws are designed to encourage. WLF seeks to file its brief to urge the court to review that inconsistency.

WLF has no direct interest in the outcome of this litigation, financial or otherwise. Accordingly, WLF can provide the Court with a perspective not shared by any of the parties.

For the foregoing reasons, the Washington Legal Foundation respectfully requests that it be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

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Dated: September 6, 2017

QUESTION PRESENTED

Whether consumers may sue for antitrust damages anyone who delivers goods to them, even where they seek damages based on prices set by third parties who would be the immediate victim of the alleged offense.

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INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law firm and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law. To that end, WLF has appeared frequently in this Court to address the proper scope of the federal antitrust laws. *See, e.g., FTC v. Actavis*, 133 S. Ct. 2223 (2013); *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, 555 U.S. 438 (2009); *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199 (1990).

WLF is concerned that the decision below greatly expands the potential for antitrust class actions against companies involved in ecommerce and other forms of agency selling. The Ninth Circuit has fundamentally changed this Court's "direct purchaser" doctrine in a manner that will significantly complicate antitrust litigation and will expose numerous companies to claims for duplicative recoveries. WLF believes that that change is inconsistent with the purposes underlying the "direct purchaser" doctrine.

WLF is also concerned that the decision below is inconsistent with the fundamental purpose of antitrust laws: to promote competition. By substantially

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. More than 10 days prior to the due date, counsel for WLF provided counsel for Respondents with notice of its intent to file.

increasing the exposure to antitrust liability of companies that aggressively enter new markets and provide consumers with innovative products, the Ninth Circuit decision threatens to chill the very sorts of activities that the antitrust laws are designed to encourage. Review is warranted to address that inconsistency.

STATEMENT OF THE CASE

The facts of the case are set out in detail in the Petition. WLF wishes to highlight several facts of particular relevance to the issues on which this brief focuses.

In June 2007, Petitioner Apple, Inc. began marketing the iPhone, the company's first cellular telephone product. The product has been highly popular with consumers. Nonetheless, throughout the past decade Apple has faced intense competition in the "smartphone" market, and no party claims that Apple monopolizes that market.

Apple's design permits and encourages independently produced software applications ("Apps") to run on the iPhone. Independent software developers have responded by creating more than 2.2 million Apple-approved Apps; they offer the majority of Apps to iPhone owners free of charge.

Apple designed its iPhone operating system as what Respondents pejoratively call a "closed system." That is, Apple retains sole discretion to decide which software applications may be downloaded to an iPhone. Contracts entered into between Apple and prospective

developers state that Apps will be sold only through an electronic marketplace maintained by Apple (the "App Store"), which provides consumers with a convenient means of finding and downloading reliable Apps.

Apple agrees to serve as the developers' agent in sales transactions conducted through the App Store. Contractors retain unfettered discretion to determine the price at which their Apps will be offered for sale. If developers offer their Apps for free, Apple alone bears the costs of reviewing, hosting, and distributing the Apps to consumers through the App Store. If a developer chooses to charge for an App, Apple imposes a commission equal to 30% of the sales price. Respondents allege that Apple conditions its approval of any App on the developer's "agreement to give Apple a [30%] share of the [developer's] sales proceeds." Pet. App. 50a. When handling sales transactions on behalf of developers, "Apple takes its 30% commission off the top and then remits the balance, or 70% of the purchase price, to the developer." *Id.* at 52a.

Respondents (purchasers of Apps at the App Store) allege that Apple has engaged in an anticompetitive scheme to monopolize the "aftermarket" for iPhone Apps, in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. Pet. App. 60a-61a. Respondents fault Apple both for maintaining a "closed system" that prevents third parties from downloading iPhone Apps and for establishing the App Store as the exclusive sales venue. *Ibid.* By acquiring monopoly power in this manner, Apple allegedly has reduced output and competition and has raised the prices that iPhone owners must pay for Apps. *Ibid.*

The district court dismissed Respondents' Second Amended Complaint (SAC) with prejudice, concluding that Respondents lacked antitrust standing because "the SAC does not allege facts from which Plaintiffs can be classified as direct purchasers." Pet. App. 36a. The court noted that Respondents "d[id] not allege in the SAC any price 'fixed' by Apple." *Ibid.* Rather, the court concluded, the 30% commission "[of] which Plaintiffs complain is not a fixed fee [imposed on them by Apple], but a cost passed-on to consumers by independent software developers." *Id.* at 37a. The court concluded that Respondents' claims were barred by the direct-purchaser doctrine set forth in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), which holds that the damages remedy in antitrust disputes belongs only to the immediate victim of the allegedly anticompetitive conduct, not to those (such as Respondents) who do not qualify as direct purchasers. *Ibid.*[2]

The Ninth Circuit reversed and remanded, concluding that Respondents "are direct purchasers of iPhone apps from Apple under *Illinois Brick* and that they therefore have standing to sue." Pet. App. 22a. In arriving at that conclusion, the appeals court deemed it irrelevant that "[i]n the case before us, the price is determined as a practical matter by the app developer who sets a price." *Id.* at 21a. Instead, the court explained, "we rest our analysis" on Apple's status as the distributor of iPhone Apps: "[b]ecause Apple is a

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[2] Having dismissed for lack of antitrust standing, the district court declined to address Apple's further claim that the SAC failed to state a claim for violation of the antitrust laws. *Ibid.*

distributor, [Respondents] have standing under *Illinois Brick* to sue Apple for allegedly monopolizing and attempting to monopolize the sale of iPhone apps." *Ibid.*

The Ninth Circuit noted that the Eighth Circuit concluded, in a case involving "a transaction closely resembling the transaction in the case before us," that the plaintiffs lacked antitrust standing to assert a claim for antitrust damages. Pet. App. 18a (citing *Campos v. Ticketmaster Corp.*, 140 F.3d 116 (8th Cir. 1998)). While recognizing that its decision directly conflicted with the Eighth Circuit's decision, the court stated, "We disagree with the majority's analysis in *Ticketmaster*" and expressed agreement with the dissenting opinion. *Id.* at 19a.

The appeals court further recognized that software developers arguably could point to the same marketing provisions relied on by Respondents and assert that they possess standing to assert antitrust claims because they are "direct purchasers" of distribution services provided by Apple. Pet. App. 20a. But the court declared its indifference to the possibility that Apple might face potential liability from two separate antitrust claims arising from a single course of conduct, stating, "But whether app developers are direct purchasers of distribution services from Apple in the sense of *Illinois Brick* makes no difference to our analysis in the case now before us." *Ibid.*

SUMMARY OF ARGUMENT

As Apple has convincingly demonstrated, the decision below directly conflicts with a decision of the

U.S. Court of Appeals for the Eighth Circuit. The need to resolve that conflict by itself provides sufficient justification to grant the petition.

WLF writes separately to focus on the conflict between the Ninth Circuit's decision and this Court's "direct purchaser" case law. The Court has repeatedly held that a plaintiff lacks antitrust standing unless he can demonstrate that he is the immediate victim—the direct purchaser—of the anticompetitive conduct alleged to violate the antitrust laws. The Court has explained that downstream purchasers lack antitrust standing even if they can demonstrate that the economic harm created by the anticompetitive conduct was passed through to them. *See, e.g., Illinois Brick*, 431 U.S. at 736-38; *Utilicorp United*, 497 U.S. at 216-17.

The Ninth Circuit "rested its analysis" of Respondents' standing on a single factor: Apple's role as the distributor of iPhone Apps. Pet. App. 21a. It determined that Respondent possess antitrust standing precisely "[b]ecause Apple is a distributor." *Ibid.* But the identity of a product's distributor simply is not germane to the factors that the Court has examined in determining who should be permitted to recover antitrust damages. If the Ninth Circuit were correct, then Apple could avoid all antitrust liability simply by delegating operation of the App Store to a third party.

The allegedly anticompetitive aspect of Apple's conduct is its decision to bar developers from selling iPhone Apps independently of Apple; rather, they must sell through the App Store and pay a commission to Apple. That conduct allegedly causes Respondents to

pay higher prices for their Apps, but those higher prices are not derived from Apple's decision to serve as the App Store distributor. Apple does not take title to the Apps sold by the developers and thus cannot be deemed to have sold anything to Respondents. If Apple is not a seller, then Respondents are not "direct purchasers" from Apple.

More importantly, the Ninth Circuit has failed to account for the Court's rationale in limiting antitrust standing to direct purchasers. In discussing its *Illinois Brick* rationale, the Court has explained that: (1) an antitrust violator "could not use a pass on defense in an action by direct purchasers" (per the Court's earlier decision in *Hanover Shoe, Inc. v. United Shoe Machinery Corp*, 392 U.S. 481 (1968)); and therefore (2) "it would risk multiple liability to allow suits by indirect purchasers." *Utilicorp United*, 497 U.S. at 207. Yet, the Ninth Circuit's decision creates the very risk of multiple liability that *Illinois Brick* and *Utilicorp United* warned against. If (as alleged by Respondents) Apple's maintenance of a "closed system" has anticompetitive effects, then App developers are directly and adversely affected—they are denied the ability to market iPhone Apps unless they pay a 30% commission to Apple. Accordingly, the developers possess antitrust standing to allege that the closed system violates antitrust laws. But according to the Ninth Circuit, purchasers of iPhone Apps also possess antitrust standing to challenge the very same business practices and to recover damages for the very same commission charges.

Indeed, the Ninth Circuit expressed indifference to this multiple-liability conundrum, stating,

"[W]hether app developers are direct purchasers of distribution services from Apple in the sense of *Illinois Brick* makes no difference to our analysis in the case now before us." Pet. App. 20a. Because the desire to prevent multiple recoveries was so central to the direct-purchaser rule adopted by *Illinois Brick* and because the Ninth Circuit's analysis blindly ignores that rationale, the Court should strongly consider summarily reversing the decision below.

Review is also warranted because the decision below is likely to deter aggressive competition of the very sort that the antitrust laws are intended to encourage. Respondents complain that Apple charges monopoly prices for its iPhone Apps, but the Court has repeatedly emphasized that "antitrust law does not prohibit lawfully obtained monopolies from charging monopoly prices." *linkLine*, 555 U.S. at 454. "Charging monopoly prices is an important element of the free-market system." *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP* ["*Trinko*"], 540 U.S. 398, 407 (2004). Indeed, "[t]he opportunity to charge monopoly prices—at least for the short term—is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth." *Ibid.*

Apple took a major financial gamble that consumers would respond favorably to its iPhone operating system, a system that provided innovative mobile phone features and the opportunity to add any of the thousands (now millions) of Apps that Apple tested and determined were of acceptable quality. Those consumers who preferred an operating system that was open to Apps from to any source could satisfy

their preference by purchasing competing products. But many consumers expressed their preference for Apple's approach by purchasing iPhones.

Respondents contend that Apple's strategy violated the antitrust laws because, they allege, it restricted competition and unfairly drove up prices of iPhone Apps. In other words, Respondents contend that Apple's risk-taking activity, which resulted in the introduction of an innovative and popular new consumer product, should be condemned under the Sherman Act because, on balance, it harmed competition.

Respondents' claims highlight a persistent problem in antitrust litigation: it can often be very difficult to distinguish vigorous competition from acts that undermine competition. Yet, if companies fear that their efforts to innovate may result in their being sanctioned under the antitrust laws, they may avoid innovative activity altogether. *See, e.g., Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986) (warning against antitrust enforcement that may "chill the very conduct the antitrust laws are designed to protect").

By upholding antitrust standing without regard to the risk of multiple liability, the Ninth Circuit decision significantly increases the danger that companies will avoid innovative activity lest they be faced with potentially ruinous antitrust liability. Congress authorized courts to award treble damages against companies engaged in conduct that undermines competition; it did not authorize six-fold damages. Review is warranted because the decision below

threatens to deter innovation by exposing companies to damages claims never authorized by Congress.

REASONS FOR GRANTING THE PETITION

I. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW DIRECTLY CONFLICTS WITH THIS COURT'S LIMITATIONS ON ANTITRUST STANDING

Section 4 of the Clayton Act, 15 U.S.C. § 15, authorizes any person injured by a violation of the antitrust laws to sue for treble damages, costs, and an attorney's fee. One could plausibly argue that virtually everyone within the United States is "injured" to some degree by a violation of the antitrust laws because the costs imposed by the violation reverberate throughout the economy as those whose costs increased due to the violation increase their prices to compensate for the loss. But the Court has consistently imposed reasonable limits on who should be deemed to have suffered a Section 4 injury, *i.e.*, to possess antitrust "standing." In particular, in *Illinois Brick* established a bright-line rule that limits antitrust standing to "direct purchasers"—those who are the immediate victims of the anticompetitive conduct.

The Court's decision to limit antitrust standing has been motivated to a significant degree by a desire to ensure that antitrust defendants will not face liability to multiple plaintiffs asserting the very same damages. The Court stated in *Illinois Brick* that "allowing offensive but not defensive use of pass on would create a serious risk of multiple liability for defendants" and that it was "unwilling to 'open the door

to duplicate recovery' under § 4." 431 U.S. at 730.[3] To avoid opening that door, the Court concluded that it must either allow both offensive and defensive use of pass on, or allow neither. *Id.* at 736. The Court ultimately determined that neither offensive nor defensive use of pass on should be permitted, a determination that has come to be known as the "direct purchaser" rule. *Id.* at 736-48.

The Court has expressed three rationales for limiting antitrust standing to the immediate victims of antitrust violations: (1) apportioning damages among direct purchasers and those to whom the direct purchasers may have passed on a portion of their increased costs is a highly complex and often insoluble problem ; (2) permitting recovery by indirect purchasers would, on average, reduce the incentives for private antitrust enforcement; and (3) limiting standing to direct purchasers eliminates the risk of multiple recoveries arising from a single damage claim. *Utilicorp United*, 497 U.S. at 206-08.

The Court has recognized that those three

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[3] "Defensive use of pass on" occurs when a defendant asserts that an antitrust plaintiff should not be permitted to recover the full amount of the overcharges he incurred because of an antitrust violation, because he was able to avoid any loss—by increasing his prices to cover the full extent of the overcharges. "Offensive use of pass on" occurs when a plaintiff asserts that although it was not a direct victim of the defendant's antitrust violations (*i.e.*, it purchased nothing directly from the defendant), those violations nonetheless caused them compensable injury because the violations ultimately caused them to pay more for goods they purchased from those who had more direct dealings with the defendant.

rationales "will not apply with equal force in all cases." *Id.* at 216. The Court has nonetheless rejected efforts to create fact-specific exceptions to the direct-purchase rule, reasoning that the "possibility of allowing an exception, even in rather meritorious circumstances, would undermine the rule" and that it is "an unwarranted and counterproductive exercise to litigate a series of exceptions." *Id.* at 216-17.

A. Respondents Are Not "Direct Purchasers" as that Term Was Understood by *Illinois Brick*

Review is warranted because the Ninth Circuit based its antitrust-standing determination on an understanding of "direct purchasers" that conflicts sharply with *Illinois Brick* and its progeny. Apple is not a "seller" of iPhone Apps in the sense contemplated by *Illinois Brick*, and thus Respondents cannot be deemed "direct purchasers" from Apple.

The Ninth Circuit "rested its analysis" of Respondents' standing on a single factor: Apple's role as the distributor of iPhone Apps. Pet. App. 21a. It determined that Respondent possess antitrust standing precisely "[b]ecause Apple is a distributor." *Ibid.* But the identity of a product's distributor simply is not germane to the factors that the Court has examined in determining who should be permitted to recover antitrust damages. If the Ninth Circuit were correct, then Apple could avoid all antitrust liability simply by delegating operation of the App Store to a third party.

Moreover, the Ninth Circuit's rationale would permit plaintiffs to claim "direct purchaser" status (and

thus antitrust standing) with respect to shippers such as UPS and Federal Express. Those companies might well object on the ground that they simply deliver goods as agents for the seller and never actually take title to the shipped goods. But that is Apple's defense as well—it is uncontested that Apple never takes title to the Apps supplied by independent software developers. And as the Ninth Circuit acknowledged, "the price is determined as a practical matter by the app developer who sets a price." Pet. App. 21a.

In many instances, a party that distributes a product to buyers is also a seller who conveys title to the product directly to the buyers. In those instances, the buyers would possess standing to assert antitrust claims against the distributor. But when, as here, the distributor neither sets the sales price nor transfers title to the buyer, nothing in *Illinois Brick* suggests that the buyer qualifies as a "direct purchaser" from the distributor.

The common law routinely rejects efforts to impose tort liability on an agent who distributes property to a purchaser at his principal's request. For example, an auctioneer acting as sales agent for the owner of a car is not responsible in a products-liability lawsuit for injuries to the purchaser caused by defects in the car. *See, e.g., New Texas Auto Auction Services, L.P. v. Gomez de Hernandez*, 249 S.W.3d 400, 404 (Tex. 2008) (citing Restatement (Third) of Torts § 1, cmt g (1998)).

Moreover, *Illinois Brick* adopted the "direct purchaser" rule in substantial part because of its ease of application. The Court reasoned that calculating the

damages incurred by a direct purchaser (the amount by which the defendant's anticompetitive conduct increased the prices paid by the direct purchaser) would be a relatively straightforward exercise. In contrast, attempting to calculate damages incurred by indirect purchasers "would add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness." *Illinois Brick*, 431 U.S. at 737. But the Ninth Circuit's classification of Respondents as "direct purchasers" from Apple, Pet. App. 17a-21a, does not facilitate the simplified damage calculations contemplated by *Illinois Brick*. Because the price charged to purchasers is determined by independent App developers, not by Apple, any damages calculation would require a Court to engage in a complex analysis to determine how much of the 30% Apple commission was incorporated into the developer's final price. The need for that complex analysis calls into question whether Respondents really qualify as *Illinois Brick* "direct purchasers."

B. The Ninth Circuit's Decision Permits Duplicative Recoveries, a Result Antithetical to the *Illinois Brick* Rule

As noted above, the Court's decision to limit antitrust standing has been motivated to a significant degree by a desire to ensure that antitrust defendants will not face liability to multiple plaintiffs asserting the very same damages. *Illinois Brick*, 431 U.S. at 731. Yet, the Ninth Circuit's decision creates the very risk of multiple liability that *Illinois Brick* and *Utilicorp United* warned against.

Respondents allege that Apple has engaged in

anti-competitive conduct by maintaining a "closed system" that prevents independent software developers from downloading Apps directly onto the iPhone and by establishing the App Store as the exclusive sales venue. Pet. App. 60a-61a. Those policies have their most direct impact on independent software developers. In the absence of those restrictions, developers would be able to sell their Apps to iPhone owners without Apple's interference. But the current policy prohibits direct contact between the developers and iPhone owners and requires developers to pay a 30% commission to Apple (for distribution services) for each App they sell through the App Store. Those direct impacts on developers undoubtedly are sufficient to establish their standing to challenge the "closed system" as a violation of antitrust laws.

Yet, according to the Ninth Circuit, purchasers of iPhone Apps also possess antitrust standing to challenge the very same business practices and to recover damages for the very same commission charges. The Ninth Circuit nonetheless makes no effort to resolve the conflict between its decision (which creates a significant danger of multiple liability) and *Illinois Brick* (which adopted the "direct purchaser" rule in large measure to prevent any possibility of multiple liability). Indeed, the Ninth Circuit expressed indifference to the danger of multiple liability, stating, "[W]hether app developers are direct purchasers of distribution services from Apple in the sense of *Illinois Brick* makes no difference to our analysis in the case now before us." Pet. App. 20a.

The Ninth Circuit's rationale is that once a "direct purchaser" is identified, there is no need to

address the issues that animated *Illinois Brick*—the extreme difficulty in apportioning damages and the potential for multiple liability. According to the Ninth Circuit, its conclusion that Respondents possess antitrust standing is "compelled" by *Hanover Shoe*, *Illinois Brick*, and *Utilicorp United* once it is determined that Apple is a "distributor" that provides iPhone Apps "directly" to Respondents. *Id.* at 21a. That approach to antitrust standing directly conflicts with *Illinois Brick*, which instructs that any rule for determining whether a plaintiff is a "person injured" (within the meaning of Section 4 of the Clayton Act) must take into account the need to avoid multiple liability. *Illinois Brick*, 431 U.S. at 729-36.

Because the desire to prevent multiple recoveries was so central to the direct-purchaser rule adopted by *Illinois Brick* and because the Ninth Circuit's analysis blindly ignores that rationale, the Court should strongly consider summarily reversing the decision below. The Court has not hesitated to summarily reverse antitrust decisions of federal appeals courts when the decisions flatly contradict prior decisions of this Court. *See, e.g., Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990) (per curiam) (summarily reversing decision that failed to recognize that "agreements between competitors to allocate territories to minimize competition" were *per se* antitrust violations).

II. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW IS LIKELY TO AFFECT A BROAD RANGE OF INDUSTRIES AND COULD END UP DETERRING COMPETITION

As the Petition explains in detail, the App Store

is hardly a unique business model. Similar agency sales models are increasingly prevalent in online electronic commerce. *See* Pet. 29-31. If the decision below remains in place, the hosts of such sales platforms will be subject to antitrust claims patched together by any enterprising lawyer who can convince one or more customers of those sites to sign on as antitrust plaintiffs. In light of the broad applicability of the decision below to a wide range of companies, review by this Court is warranted.

A. The Threat of Excessive Antitrust Liability Can Inappropriately Deter Competition

Review is particularly warranted because the decision below is likely to deter aggressive competition of the very sort that the antitrust laws are intended to encourage. The danger of overdeterrence is particularly acute, when (as here) plaintiffs allege a violation of Section 2 of the Sherman Act, which prohibits monopolizing, or attempting to monopolize "any part of the trade or commerce among the several states." 15 U.S.C. § 2. The distinction between authorized and illegal monopoly activity is often difficult to discern.

This Court has repeatedly emphasized that antitrust intervention entails "costs" to competition:

> Under the best of circumstances, applying the requirements of § 2 "can be difficult" because "the means of illicit exclusion, like the means of legitimate competition, are myriad." *United States v. Microsoft*

> *Corp.*, 253 F.3d 34, 58 (C.A.D.C. 2001 (en banc) (*per curiam*). Mistaken inferences and the resulting false condemnations are "especially costly, because they chill the very conduct that antitrust laws are designed to protect." The cost of false positives counsels against an undue expansion of § 2 liability.

Trinko, 540 U.S. at 883 (quoting *Matsushita Elec.*, 475 U.S. at 594). *See also Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 226 (1993) (stating that "the costs of an erroneous finding of [§ 2] liability are high"). As two leading commentators have explained, "One problem haunting most antitrust litigation ... is that vigorous competition may look very similar to acts that *undermine* competition. The resulting danger is that courts will prohibit ... acts that *appear* to be anticompetitive but really are the opposite." William J. Baumol and Alan S. Blinder, *Economics: Principles and Policy* 425-26 (8th ed. 2000) (emphasis in original).

B. Respondents' Antitrust Claim—That Apple Improperly Monopolized the "Aftermarket for iPhone Apps"—Threatens to Deter Pro-Competitive Conduct

Respondents allege that Apple has improperly monopolized the "aftermarket for iPhone Apps." Pet. App. 60a. They allege that Apple unlawfully acquired monopoly power over this aftermarket by designing the iPhone as a "closed system" and requiring all iPhone Apps to be purchased through the App Store—thereby

permitting Apple to extract a 30% commission on all App sales. *Id.* at 60a-61a.

Whether those allegations adequately state a § 2 claim upon which relief can be granted is not an issue before the Court. But what *is* before the Court is the Ninth Circuit idiosyncratic interpretation of *Illinois Brick*'s "direct purchaser" rule. By adopting an interpretation that fails to guard against multiple liability and thereby substantially heightens exposure to antitrust damages claims, the Ninth Circuit decision threatens to deter competition by companies that do not wish to expose themselves to such claims.

That Apple engaged in substantial amounts of pro-competitive conduct when it decided to launch the iPhone in 2007 is a matter of record. At that time, the smartphone market had just begun to develop, and Apple had zero share of it. The iPhone and the App Store have greatly expanded consumer choice. As Respondents recognize, the iPhone "revolution[ized]" the cell phone industry. Pet. App. 48a. Consumers now have access to huge numbers of Apps for a variety of smartphones. Apple alone offers more than two million Apps, the majority of which are free. Pet. 7. Consumers who are dissatisfied with the prices of iPhone Apps have readily available alternatives: they can purchase competing apps and apply them to other smartphone brands.

Respondents nonetheless contend that Apple improperly restricted competition by maintaining a monopoly over the aftermarket for iPhone Apps, thereby enabling Apple to extract a monopoly profit from all sales. But as this Court has repeatedly

emphasized, "Charging monopoly prices is an important element of the free-market system. ... The opportunity to charge monopoly prices—at least for the short term—is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth." *Trinko*, 540 U.S. at 407. In order "[t]o safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful [under § 2] unless it is accompanied by an element of anticompetitive *conduct*." *Ibid* (emphasis in original).

The "incentive to innovate" is substantially reduced if, as a result of relaxation of antitrust standing rules, arguably innovative activity can expose a company to six-fold antitrust damages claims rather than the treble damages authorized by Congress. *See Illinois Brick*, 431 U.S. at 731 n.11 ("[P]roponents of [granting antitrust standing to indirect purchasers] fall back on the argument that it is better for the defendant to pay sixfold or more damages than for an injured party to go uncompensated. ... Tr. of Oral Arg. 58 ('a little slopover on the shoulders of the wrongdoers ... is acceptable.') We do not find this risk acceptable."). Review is warranted because the decision below threatens to deter innovation by exposing a large number of companies—particularly e-commerce companies—to damages claims never authorized by Congress.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

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September 6, 2017

No. 17-204

In the Supreme Court of the United States

IN RE APPLE IPHONE ANTITRUST LITIGATION,

APPLE INC.,
Petitioner,
v.
ROBERT PEPPER, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED AUGUST 2, 2017
CERTIORARI GRANTED JUNE 18, 2018

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United States District Court for the Northern District of California Transcript of Proceedings held Mar. 5, 2013, *In re Apple iPhone Antitrust Litig.*, No. 11-cv-06714-YGR (N.D. Cal. Apr. 3, 2013), ECF No. 107 (excerpts)..... JA-78

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Defendant Apple's Reply in Support of Motion to Dismiss Plaintiffs' Second Amended Complaint, *In re Apple iPhone Antitrust Litig.*, No. C 11-cv-06714-YGR (N.D. Cal. filed Oct. 22, 2013), ECF No. 118 (excerpts) JA-132

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ITEMS PREVIOUSLY REPRODUCED

In accordance with Supreme Court Rule 26.1, the following items have been omitted in printing this joint appendix because they appear on the following pages of the appendix to the Petition for a Writ of Certiorari (Aug. 2, 2017)

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RELEVANT DOCKET ENTRIES

U.S. Court of Appeals for the Ninth Circuit
Case No. 14-15000

Date Filed	#	Docket Text
01/02/2014	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. SEND MQ: Yes. The schedule is set as follows: Mediation Questionnaire due on 01/09/2014. Transcript ordered by 01/30/2014. Transcript due 03/03/2014. Appellants Edward W. Hayter, Robert Pepper, Stephen H. Schwartz and Eric Terrell opening brief due 04/10/2014. Appellee Apple, Inc. answering brief due 05/12/2014. Appellant's optional reply brief is due 14 days after service of the answering brief. [8921930] (RT) [Entered: 01/02/2014 09:24 AM]
		* * *
05/12/2014	7	Submitted (ECF) Opening Brief and excerpts of record for review. Submitted by Appellants Edward W. Hayter, Robert Pepper, Stephen H. Schwartz and Eric Terrell. Date of service: 05/12/2014. [9092295] (Rickert, Rachele) [Entered: 05/12/2014

05:16 PM]

05/13/2014	8	Filed clerk order: The opening brief [7] submitted by Edward W. Hayter, Robert Pepper and Stephen H. Schwartz is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: blue. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate ECF. The Court has reviewed the excerpts of record [7] submitted by Edward W. Hayter, Robert Pepper and Stephen H. Schwartz. Within 7 days of this order, filer is ordered to file 4 copies of the excerpts in paper format, with a white cover. The paper copies must be in the format described in 9th Circuit Rule 30-1.6. [9093179] (WWP) [Entered: 05/13/2014 11:43 AM]
05/16/2014	9	Filed Appellants Edward W. Hayter, Robert Pepper, Stephen H. Schwartz and Eric Terrell paper copies of excerpts of record

		[7] in 2 volume(s). [9098732] (WWP) [Entered: 05/16/2014 11:21 AM]
05/16/2014	10	Received 7 paper copies of Opening brief [7] filed by Edward W. Hayter, et al. [9099246] (SD) [Entered: 05/16/2014 02:13 PM]
		* * *
07/11/2014	15	Submitted (ECF) Answering Brief and supplemental excerpts of record for review. Submitted by Appellee Apple, Inc.. Date of service: 07/11/2014. [9166529] (Wall, Daniel) [Entered: 07/11/2014 04:41 PM]
7/11/2014	16	Filed (ECF) Appellee Apple, Inc. Motion to take judicial notice of. Date of service: 07/11/2014. [9166553] (Wall, Daniel) [Entered: 07/11/2014 04:47 PM]
07/14/2014	17	Filed clerk order: The answering brief [15] submitted by Apple, Inc. is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: red. The paper copies shall be printed from the PDF version

		of the brief created from the word processing application, not from PACER or Appellate ECF. The Court has reviewed the supplemental excerpts of record [15] submitted by Apple, Inc.. Within 7 days of this order, filer is ordered to file 4 copies of the excerpts in paper format, with a white cover. The paper copies must be in the format described in 9th Circuit Rule 30-1.6. [9167135] (WWP) [Entered: 07/14/2014 10:38 AM]
07/14/2014	18	Received 7 paper copies of Answering brief [15] filed by Apple, Inc.. [9168197] (SD) [Entered: 07/14/2014 03:44 PM]
07/14/2014	19	Filed Appellee Apple, Inc. paper copies of excerpts of record [15] in 1 volume. [9168688] (WWP) [Entered: 07/15/2014 07:12 AM]
		* * *
08/25/2014	22	Submitted (ECF) Reply Brief for review. Submitted by Appellants Edward W. Hayter, Robert Pepper, Stephen H. Schwartz and Eric Terrell. Date of service: 08/25/2014. [9218285] (Rickert, Rachele) [Entered: 08/25/2014 04:43 PM]

08/25/2014	23	Filed (ECF) Appellants Edward W. Hayter, Robert Pepper, Stephen H. Schwartz and Eric Terrell response opposing motion (,motion to take judicial notice). Date of service: 08/25/2014. [9218303] (Rickert, Rachele) [Entered: 08/25/2014 04:47 PM]
08/28/2014	24	Filed clerk order: The reply brief [22] submitted by Edward W. Hayter, Robert Pepper, Stephen H. Schwartz and Eric Terrell is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: gray. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate ECF. [9222326] (WWP) [Entered: 08/28/2014 10:37 AM]
09/02/2014	25	Received 7 paper copies of Reply brief [22] filed by Edward W. Hayter,et al. [9225407] (SD) [Entered: 09/02/2014 11:10 AM]
09/02/2014	26	Filed (ECF) Appellee Apple, Inc. reply to response (,motion to take

		judicial notice,). Date of service: 09/02/2014. [9226064] (Wall, Daniel) [Entered: 09/02/2014 04:02 PM]
		* * *
02/10/2016	31	ARGUED AND SUBMITTED TO A. WALLACE TASHIMA, WILLIAM A. FLETCHER and ROBERT W. GETTLEMAN. [9861584] (TLH) [Entered: 02/10/2016 02:54 PM]
01/12/2017	32	Filed order (A. WALLACE TASHIMA, WILLIAM A. FLETCHER and ROBERT W. GETTLEMAN) Appellee Apple, Inc.'s motion to take judicial notice dated July 11, 2014, is DENIED. [10263236] (PH) [Entered: 01/12/2017 09:08 AM]
01/12/2017	33	FILED OPINION (A. WALLACE TASHIMA, WILLIAM A. FLETCHER and ROBERT W. GETTLEMAN) REVERSED AND REMANDED. Judge: AWT , Judge: WAF Authoring, Judge: RWG . FILED AND ENTERED JUDGMENT. [10263240] (PH) [Entered: 01/12/2017 09:12 AM]
		* * *
01/26/2017	35	Filed (ECF) Appellee Apple Inc. petition for panel rehearing and petition for rehearing en banc

(from 01/12/2017 opinion). Date of service: 01/26/2017. [10282274] [14-15000] (Wall, Daniel) [Entered: 01/26/2017 06:24 PM]

02/07/2017 36 Filed order (A. WALLACE TASHIMA, WILLIAM A. FLETCHER and ROBERT W. GETTLEMAN): Plaintiffs-Appellants are directed to file a response to Apple's Petition for Rehearing and Rehearing En Banc filed with this court on January 26, 2017. The response shall not exceed fifteen pages or 4200 words, and shall be filed within 21 days of the date of this order. [10304859] (AF) [Entered: 02/07/2017 08:25 AM]

* * *

02/28/2017 38 Filed (ECF) Appellants Edward W. Hayter, Robert Pepper, Stephen H. Schwartz and Eric Terrell response to Combo PFR Panel and En Banc (ECF Filing) , Combo PFR Panel and En Banc (ECF Filing) for panel and en banc rehearing. Date of service: 02/28/2017. [10336910].--[COURT ENTERED FILING to correct entry [37].] (SLM) [Entered: 02/28/2017 03:07 PM]

05/04/2017	39	Filed order (A. WALLACE TASHIMA, WILLIAM A. FLETCHER and ROBERT W. GETTLEMAN): The panel has voted unanimously to deny the petition for rehearing. Judge Fletcher has voted to deny the petition for rehearing en banc, and Judges Tashima and Gettleman so recommend. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing and the petition for rehearing en banc, filed January 26, 2017, are DENIED. [10421696] (AF) [Entered: 05/04/2017 09:59 AM]
		* * *
08/08/2017	41	**Supreme Court Case Info** Case number: 17-204 Filed on: 08/02/2017 Cert Petition Action 1: Pending [10537109] (RR) [Entered: 08/08/2017 12:51 PM]
06/20/2018	42	**Supreme Court Case Info** Case number: 17-204 Filed on: 08/02/2017 Cert Petition Action 1: Granted,

06/18/2018

. The motion of ACT The App Association for leave to file a brief as amicus curiae is granted. The motion of Washington Legal Foundation for leave to file a brief as amicus curiae is granted. [10916131] (RR) [Entered: 06/20/2018 02:55 PM]

RELEVANT DOCKET ENTRIES

U.S. District Court
for the Northern District of California
Case No. 4:11-cv-06714-YGR

Date Filed	#	Docket Text
12/29/2011	1	COMPLAINT against Apple Inc. (Filing fee $ 350, receipt number 34611068684.). Filed byRobert Pepper, Edward W. Hayter, Harry Bass, Stephen H. Schwartz. (Attachments: # 1 Summons)(ga, COURT STAFF) (Filed on 12/29/2011) (Additional attachment(s) added on 1/11/2016: # 2 Summons issued **Correction of Attachment** 1) (kc, COURT STAFF). (Entered: 12/29/2011)
		* * *
03/02/2012	14	MOTION to Dismiss filed by Apple Inc.. Motion Hearing set for 4/16/2012 09:00 AM in Courtroom 9, 19th Floor, San Francisco before Hon. James Ware. Responses due by 3/16/2012. Replies due by 3/23/2012. (Attachments: # 1 Proposed Order)(Yates, Christopher) (Filed on 3/2/2012) (Entered: 03/02/2012)

* * *

03/16/2012	23	RESPONSE (re 14 MOTION to Dismiss) *Plaintiffs' Opposition to Defendant Apple Inc.'s Motion to Dismiss* filed byHarry Bass, Edward W. Hayter, Robert Pepper, Stephen H. Schwartz. (Rickert, Rachele) (Filed on 3/16/2012) (Entered: 03/16/2012)
03/16/2012	24	Declaration of Rachele R. Rickert in Support of 23 Opposition/ Response to Motion *Declaration of Rachele R. Rickert in Support of Plantiffs' Opposition to Defendant Apple Inc.'s Motion to Dismiss* filed byHarry Bass, Edward W. Hayter, Robert Pepper, Stephen H. Schwartz. (Related document(s) 23) (Rickert, Rachele) (Filed on 3/16/2012) (Entered: 03/16/2012)
03/20/2012	25	ORDER VACATING CASE MANAGEMENT CONFERENCE; CONSOLIDATING CASES; DENYING MOTION TO DISMISS AS MOOT, Cases associated., Motions terminated: (14 in 3:11-cv-06714-JW) MOTION to Dismiss filed by Apple Inc.. Signed by Judge James Ware on 3/20/12. (sis, COURT STAFF) (Filed on

		3/20/2012) (Entered: 03/20/2012)
03/21/2012	26	CONSOLIDATED CLASS ACTION COMPLAINT against Apple Inc. DEMAND FOR JURY TRIAL. Filed by Edward W. Hayter, Robert Pepper, Harry Bass, Stephen H. Schwartz, Eric Terrell, James Blackwell, Crystal Boykin. (Rickert, Rachele) (Filed on 3/21/2012) Modified on 3/22/2012 (far, COURT STAFF). (Entered: 03/21/2012)
03/26/2012	27	MOTION to Appoint Lead Plaintiff and Lead Counsel *Notice of Motion and Motion for Appointment of Interim Class Counsel; Memorandum of Points and Authorities* filed by Harry Bass, Edward W. Hayter, Robert Pepper, Stephen H. Schwartz. Motion Hearing set for 5/21/2012 09:00 AM in Courtroom 9, 19th Floor, San Francisco before Hon. James Ware. Responses due by 4/9/2012. Replies due by 4/16/2012. (Attachments: # 1 Proposed Order)(Rickert, Rachele) (Filed on 3/26/2012) (Entered: 03/26/2012)
03/26/2012	28	Declaration of Rachele R. Rickert in Support of 27 MOTION to Appoint Lead Plaintiff and Lead

		Counsel *Notice of Motion and Motion for Appointment of Interim Class Counsel; Memorandum of Points and Authorities* filed byHarry Bass, Edward W. Hayter, Robert Pepper, Stephen H. Schwartz. (Attachments: # 1 Exhibit Exhibits A-B, # 2 Exhibit Exhibits C-F, # 3 Certificate/Proof of Service)(Related document(s) 27) (Rickert, Rachele) (Filed on 3/26/2012) (Entered: 03/26/2012)
		* * *
04/09/2012	34	ORDER by Judge James Ware granting 27 Motion to Appoint Lead Plaintiff and Lead Counsel (jwlc3, COURT STAFF) (Filed on 4/9/2012) (Entered: 04/09/2012)
		* * *
04/16/2012	36	Administrative Motion to File Under Seal *Defendant Apple Inc.'s Motion to Dismiss Plaintiffs' Consolidated Complaint* filed by Apple Inc.. (Attachments: # 1 Declaration in Support, # 2 Proposed Order)(Yates, Christopher) (Filed on 4/16/2012) (Entered: 04/16/2012)
04/16/2012	37	MOTION to Dismiss *[REDACTED]* filed by Apple Inc.. Motion Hearing set for 6/11/2012 09:00 AM in Courtroom 9, 19th

		Floor, San Francisco before Hon. James Ware. Responses due by 4/30/2012. Replies due by 5/7/2012. (Yates, Christopher) (Filed on 4/16/2012) (Entered: 04/16/2012)
04/16/2012	38	Declaration of Eddy Cue in Support of 37 MOTION to Dismiss *[REDACTED]* filed byApple Inc.. (Related document(s) 37) (Yates, Christopher) (Filed on 4/16/2012) (Entered: 04/16/2012)
04/16/2012	39	Declaration of Shari Ross Lahlou in Support of 37 MOTION to Dismiss *[REDACTED]* filed byApple Inc.. (Related document(s) 37) (Yates, Christopher) (Filed on 4/16/2012) (Entered: 04/16/2012)
04/16/2012	40	Proposed Order re 37 MOTION to Dismiss *[REDACTED]* by Apple Inc.. (Yates, Christopher) (Filed on 4/16/2012) (Entered: 04/16/2012)
04/25/2012	41	ORDER by Judge James Ware granting 36 Administrative Motion to File Under Seal (tdm, COURT STAFF) (Filed on 4/25/2012) (Entered: 04/25/2012)

04/25/2012	42	DOCUMENT E-FILED UNDER SEAL re 41 Order on Administrative Motion to File Under Seal *Defendant Apple Inc.'s Motion to Dismiss Plaintiffs' Consolidated Complaint* by Apple Inc.. (Attachments: # 1 Declaration of Eddy Cue In Support)(Yates, Christopher) (Filed on 4/25/2012) (Entered: 04/25/2012)
05/07/2012	43	Administrative Motion to File Under Seal *Plaintiffs' Notice of Motion and Administrative Motion to File Under Seal [Pursuant to Civil L.R. 7-11 And 79-5(d)]* filed by Harry Bass, James Blackwell, Crystal Boykin, Edward W. Hayter, Robert Pepper, Stephen H. Schwartz, Eric Terrell. (Rickert, Rachele) (Filed on 5/7/2012) (Entered: 05/07/2012)
05/07/2012	44	RESPONSE (re 43 Administrative Motion to File Under Seal *Plaintiffs' Notice of Motion and Administrative Motion to File Under Seal [Pursuant to Civil L.R. 7-11 And 79-5(d)]*) [*REDACTED*] filed byHarry Bass, James Blackwell, Crystal Boykin, Edward W. Hayter, Robert Pepper, Stephen

H. Schwartz, Eric Terrell. (Rickert, Rachele) (Filed on 5/7/2012) (Entered: 05/07/2012)

05/07/2012	45	Declaration of Rachele R. Rickert in Support of 44 Opposition/ Response to Motion, *Declaration of Rachele R. Rickert In Support of Plaintiffs' Opposition To Defendant Apple Inc.'s Motion to Dismiss the Consolidated Complaint [REDACTED]* filed byHarry Bass, James Blackwell, Crystal Boykin, Edward W. Hayter, Robert Pepper, Stephen H. Schwartz, Eric Terrell. (Related document(s) 44) (Rickert, Rachele) (Filed on 5/7/2012) (Entered: 05/07/2012)

* * *

05/14/2012	47	RESPONSE (re 43 Administrative Motion to File Under Seal *Plaintiffs' Notice of Motion and Administrative Motion to File Under Seal [Pursuant to Civil L.R. 7-11 And 79-5(d)]*) filed byApple Inc.. (Yates, Christopher) (Filed on 5/14/2012) (Entered: 05/14/2012)
05/14/2012	48	MOTION to Compel *Arbitration of Claims* filed by Apple Inc.. Motion Hearing set for 6/18/2012 09:00 AM in Courtroom 9, 19th

		Floor, San Francisco before Hon. James Ware. Responses due by 5/29/2012. Replies due by 6/5/2012. (Attachments: # 1 Exhibit 1, # 2 Proposed Order)(Yates, Christopher) (Filed on 5/14/2012) (Entered: 05/14/2012)
		* * *
05/15/2012	50	Proposed Order re 43 Administrative Motion to File Under Seal *Plaintiffs' Notice of Motion and Administrative Motion to File Under Seal [Pursuant to Civil L.R. 7-11 And 79-5(d)]* by Apple Inc.. (Yates, Christopher) (Filed on 5/15/2012) (Entered: 05/15/2012)
		* * *
05/16/2012	52	ORDER GRANTING PLAINTIFFS' ADMINISTRATIVE MOTION TO FILE UNDER SEAL by Judge James Ware granting 43 Administrative Motion to File Under Seal. Signed by Judge James Ware on May 16, 2012. (wsn, COURT STAFF) (Filed on 5/16/2012) (Entered: 05/16/2012)
		* * *
05/18/2012	56	Administrative Motion to File Under Seal *the Reply in Support*

		of Motion to Dismiss Plaintiffs' Second Amended Complaint filed by Apple Inc.. (Attachments: # 1 Proposed Order)(Yates, Christopher) (Filed on 5/18/2012) (Entered: 05/18/2012)
05/18/2012	57	REPLY (re 37 MOTION to Dismiss *[REDACTED]*) filed byApple Inc.. (Yates, Christopher) (Filed on 5/18/2012) (Entered: 05/18/2012)
05/22/2012	58	ORDER GRANTING DEFENDANT APPLE INC.S ADMINISTRATIVE MOTION TO FILE UNDER SEAL signed by Judge James Ware granting 56 Administrative Motion to File Under Seal. (wsn, COURT STAFF) (Filed on 5/22/2012) (Entered: 05/22/2012)
05/22/2012	59	DOCUMENT E-FILED UNDER SEAL re 58 Order on Administrative Motion to File Under Seal *Defendant Apple Inc.'s Reply in Support of its Motion to Dismiss Plaintiffs' Consolidated Complaint* by Apple Inc.. (Yates, Christopher) (Filed on 5/22/2012) (Entered: 05/22/2012)
		* * *
05/29/2012	61	RESPONSE (re 48 MOTION to Compel *Arbitration of Claims*)

		filed byHarry Bass, James Blackwell, Crystal Boykin, Edward W. Hayter, Robert Pepper, Stephen H. Schwartz, Eric Terrell. (Rifkin, Mark) (Filed on 5/29/2012) (Entered: 05/29/2012)
05/29/2012	62	Declaration of Mark C. Rifkin in Support of 61 Opposition/ Response to Motion *Declaration of Mark C. Rifkin In Support of Plaintiffs' Opposition to Apple's Motion to Compel Arbitration* filed byHarry Bass, James Blackwell, Crystal Boykin, Edward W. Hayter, Robert Pepper, Stephen H. Schwartz, Eric Terrell. (Related document(s) 61) (Rifkin, Mark) (Filed on 5/29/2012) (Entered: 05/29/2012)
05/29/2012	63	Declaration of Simon J. Wilkie, PH.D. in Support of 61 Opposition/Response to Motion *Expert Declaration of Simon J. Wilkie, PH.D.* filed byHarry Bass, James Blackwell, Crystal Boykin, Edward W. Hayter, Robert Pepper, Stephen H. Schwartz, Eric Terrell. (Related document(s) 61) (Rifkin, Mark) (Filed on 5/29/2012) (Entered: 05/29/2012)

05/29/2012	64	Declaration of Michael A. Williams, PH.D. in Support of 61 Opposition/Response to Motion *Expert Declaration of Michael A. Williams, PH.D.* filed byHarry Bass, James Blackwell, Crystal Boykin, Edward W. Hayter, Robert Pepper, Stephen H. Schwartz, Eric Terrell. (Related document(s) 61) (Rifkin, Mark) (Filed on 5/29/2012) (Entered: 05/29/2012)
06/05/2012	65	REPLY (re 48 MOTION to Compel *Arbitration of Claims*) filed byApple Inc.. (Yates, Christopher) (Filed on 6/5/2012) (Entered: 06/05/2012)
06/08/2012	66	MOTION for Leave to File *Plaintiffs' Civil L.R. 7-3 Motion For Permission To File A Sur-Reply Brief On Apple Inc.'s Motion To Compel Arbitration [ECF No. 48]* filed by Harry Bass, James Blackwell, Crystal Boykin, Edward W. Hayter, Robert Pepper, Stephen H. Schwartz, Eric Terrell. (Attachments: # 1 Proposed Order [Proposed] Order Granting Plaintiffs' Civil L.R. 7-3 Motion For Permission To File A Sur-Reply Brief On Apple Inc.'s Motion To Compel Arbitration [ECF No. 48])(Rickert, Rachele)

(Filed on 6/8/2012) (Entered: 06/08/2012)

06/08/2012 67 Declaration of Mark C. Rifkin in Support of 66 MOTION for Leave to File *Plaintiffs' Civil L.R. 7-3 Motion For Permission To File A Sur-Reply Brief On Apple Inc.'s Motion To Compel Arbitration [ECF No. 48] Declaration of Mark C. Rifkin In Support of Plaintiffs' Civil L.R. 7-3 Motion For Permission To File A Sur-Reply Brief On Apple Inc.'s Motion to Compel Arbitration [ECF No. 48]* filed byHarry Bass, James Blackwell, Crystal Boykin, Edward W. Hayter, Robert Pepper, Stephen H. Schwartz, Eric Terrell. (Related document(s) 66) (Rickert, Rachele) (Filed on 6/8/2012) (Entered: 06/08/2012)

06/12/2012 68 RESPONSE (re 66 MOTION for Leave to File *Plaintiffs' Civil L.R. 7-3 Motion For Permission To File A Sur-Reply Brief On Apple Inc.'s Motion To Compel Arbitration [ECF No. 48]*) filed byApple Inc.. (Yates, Christopher) (Filed on 6/12/2012) (Entered: 06/12/2012)

06/15/2012 69 OBJECTIONS to re 67 Declaration in Support,, 62 Declaration in Support, *in*

		connection with Apple's Motion to Compel Arbitration by Apple Inc.. (Yates, Christopher) (Filed on 6/15/2012) (Entered: 06/15/2012)
06/18/2012	70	Minute Entry: Motion Hearing held on 6/18/2012 before Chief Judge James Ware re 48 MOTION to Compel; and 37 MOTION to Dismiss. (Date Filed: 6/18/2012). (Court Reporter Jim Yeomans.) (wsn, COURT STAFF) (Date Filed: 6/18/2012) (Entered: 06/18/2012)
06/21/2012	71	Transcript of Proceedings held on 06/18/12, before Judge James Ware. Court Reporter/Transcriber James Yeomans, Telephone number (415) 863-5179. Per General Order No. 59 and Judicial Conference policy, this transcript may be viewed only at the Clerks Office public terminal or may be purchased through the Court Reporter/Transcriber until the deadline for the Release of Transcript Restriction.After that date it may be obtained through PACER. Any Notice of Intent to Request Redaction, if required, is due no later than 5 business days from date of this filing. Release of Transcript Restriction set for 9/19/2012. (jjy, COURT STAFF)

(Filed on 6/21/2012) (Entered: 06/21/2012)

07/02/2012 72 MOTION for Leave to File *Plaintiffs' L.R. 7-3 Motion For Persmission To File A Supplemental Brief On Apple Inc.'s Motion To Dismiss [ECF No. 37] And Motion to Compel Arbitration [ECF No. 48]* filed by Harry Bass, James Blackwell, Crystal Boykin, Edward W. Hayter, Robert Pepper, Stephen H. Schwartz, Eric Terrell. (Attachments: # 1 Proposed Order [Proposed] Order Granting Plaintiffs' Civil L.R. 7-3 Motion For Permission To File A Supplemental Brief On Apple Inc.'s Motion to Dismiss [ECF No. 37] And Motion To Compel Arbitration [ECF No. 48])(Rifkin, Mark) (Filed on 7/2/2012) (Entered: 07/02/2012)

07/02/2012 73 Declaration of Mark C. Rifkin in Support of 72 MOTION for Leave to File *Plaintiffs' L.R. 7-3 Motion For Persmission To File A Supplemental Brief On Apple Inc.'s Motion To Dismiss [ECF No. 37] And Motion to Compel Arbitration [ECF No. 48]* filed byHarry Bass, James Blackwell, Crystal Boykin, Edward W.

		Hayter, Robert Pepper, Stephen H. Schwartz, Eric Terrell. (Related document(s) 72) (Rifkin, Mark) (Filed on 7/2/2012) (Entered: 07/02/2012)
07/06/2012	74	RESPONSE (re 72 MOTION for Leave to File *Plaintiffs' L.R. 7-3 Motion For Persmission To File A Supplemental Brief On Apple Inc.'s Motion To Dismiss [ECF No. 37] And Motion to Compel Arbitration [ECF No. 48]*) filed byApple Inc.. (Yates, Christopher) (Filed on 7/6/2012) (Entered: 07/06/2012)
07/11/2012	75	ORDER by Judge James Ware granting in part and denying in part 37 Motion to Dismiss; denying 48 Motion to Compel; finding as moot 66 Motion for Leave to File; denying 72 Motion for Leave to File (jwlc2, COURT STAFF) (Filed on 7/11/2012) (Entered: 07/11/2012)
		* * *
09/28/2012	81	*AMENDED CONSOLIDATED CLASS ACTION COMPLAINT; JURY TRIAL* against Apple Inc.. Filed byCrystal Boykin, Robert Pepper, Edward W. Hayter, James Blackwell, Harry Bass, Eric Terrell, Stephen H.

		Schwartz. (Rickert, Rachele) (Filed on 9/28/2012) Modified on 10/1/2012 (cpS, COURT STAFF). (Entered: 09/28/2012)
		* * *
11/02/2012	87	MOTION to Relate Case and [Proposed] Order filed by Apple Inc. (Attachments: # 1 Proposed Order) (Yates, Christopher) (Filed on 11/2/2012) Modified on 11/5/2012 (cjl, COURT STAFF). (Entered: 11/02/2012)
11/02/2012	88	MOTION to Dismiss and [Proposed] Order filed by Apple Inc. Motion Hearing set for 12/18/2012 02:00 PM before Hon. Yvonne Gonzalez Rogers. Responses due by 11/16/2012. Replies due by 11/26/2012. (Attachments: # 1 Proposed Order)(Wall, Daniel) (Filed on 11/2/2012) Modified on 11/5/2012 (cjl, COURT STAFF). (Entered: 11/02/2012)
11/02/2012	89	Request for Judicial Notice re 88 MOTION to Dismiss filed byApple Inc.. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2)(Related document(s) 88) (Wall, Daniel) (Filed on 11/2/2012) (Entered: 11/02/2012)
		* * *

12/07/2012	99	RESPONSE (re 88 MOTION to Dismiss) *PLAINTIFFS MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT APPLES MOTION TO DISMISS THE AMENDED CONSOLIDATED COMPLAINT* filed byHarry Bass, James Blackwell, Crystal Boykin, Edward W. Hayter, Robert Pepper, Stephen H. Schwartz, Eric Terrell. (Schmidt, Alexander) (Filed on 12/7/2012) (Entered: 12/07/2012)
12/07/2012	100	Declaration of Michael Liskow in Support of 99 Opposition/ Response to Motion, filed byHarry Bass, James Blackwell, Crystal Boykin, Edward W. Hayter, Robert Pepper, Stephen H. Schwartz, Eric Terrell. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E)(Related document (s) 99) (Liskow, Michael) (Filed on 12/7/2012) (Entered: 12/07/2012)
12/10/2012	101	Minute Entry: Initial Case Management Conference held on 12/10/2012 before Yvonne Gonzalez Rogers (Date Filed: 12/10/2012). Further Case

		Management Conference set for 12/17/2012 02:00 PM in Courtroom 5, 2nd Floor, Oakland. (Court Reporter Raynee Mercado.) (fs, COURT STAFF) (Date Filed: 12/10/2012) (Entered: 12/10/2012)
		* * *
12/18/2012	102	Transcript of Proceedings held on December 10, 2012, before Judge Yvonne Gonzalez Rogers. Court Reporter Raynee H. Mercado, CSR, Telephone number 510-451-7530, raynee_mercado@cand.uscourts.gov, rayneeh@hotmail.com. Per General Order No. 59 and Judicial Conference policy, this transcript may be viewed only at the Clerks Office public terminal or may be purchased through the Court Reporter until the deadline for the Release of Transcript Restriction.After that date it may be obtained through PACER. Any Notice of Intent to Request Redaction, if required, is due no later than 5 business days from date of this filing. Redaction Request due 1/8/2013. Redacted Transcript Deadline set for 1/18/2013. Release of Transcript Restriction set for 3/18/2013. (rhm) (Filed on 12/18/2012)

(Entered: 12/18/2012)

12/21/2012	103	REPLY (re 88 MOTION to Dismiss) filed byApple Inc.. (Huseny, Sadik) (Filed on 12/21/2012) (Entered: 12/21/2012)

* * *

03/05/2013	106	Minute Entry: Motion Hearing held and submitted on 3/5/2013 before Yvonne Gonzalez Rogers (Date Filed: 3/5/2013) re 88 MOTION to Dismiss filed by Apple Inc.. (Court Reporter Raynee Mercado.) (fs, COURT STAFF) (Date Filed: 3/5/2013) (Entered: 03/13/2013)
04/03/2013	107	Transcript of Proceedings held on March 5, 2013, before Judge Yvonne Gonzalez Rogers. Court Reporter Raynee H. Mercado, CSR, Telephone number 510-451-7530, rayneeh@hotmail.com, raynee_mercado@cand.uscourts.gov. Per General Order No. 59 and Judicial Conference policy, this transcript may be viewed only at the Clerks Office public terminal or may be purchased through the Court Reporter until the deadline for the Release of Transcript Restriction.After that date it may be obtained through PACER. Any Notice of Intent to Request

		Redaction, if required, is due no later than 5 business days from date of this filing. Release of Transcript Restriction set for 7/2/2013. (rhm) (Filed on 4/3/2013) (Entered: 04/03/2013)
08/15/2013	108	**ORDER by Judge Yvonne Gonzalez Rogers granting 88 Motion to Dismiss Plaintiffs' Amended Consolidated Complaint with Leave to Amend. (fs, COURT STAFF) (Filed on 8/15/2013) (Entered: 08/15/2013)**
		* * *
09/05/2013	111	AMENDED COMPLAINT CONSOLIDATED CLASS ACTION COMPLAINT (SECOND); Jury Demand against Robert Pepper, Edward W. Hayter, Eric Terrell, Stephen H. Schwartz. Filed byRobert Pepper, Edward W. Hayter, Eric Terrell, Stephen H. Schwartz. (Rickert, Rachele) (Filed on 9/5/2013) Modified on 9/6/2013 (cpS, COURT STAFF). (Entered: 09/05/2013)
		* * *
09/30/2013	115	MOTION to Dismiss *Plaintiffs' Second Amended Complaint* filed by Apple Inc.. Motion Hearing set

for 11/5/2013 02:00 PM in Courtroom 5, 2nd Floor, Oakland before Hon. Yvonne Gonzalez Rogers. Responses due by 10/15/2013. Replies due by 10/22/2013. (Attachments: # 1 Proposed Order)(Wall, Daniel) (Filed on 9/30/2013) (Entered: 09/30/2013)

10/15/2013 116 RESPONSE (re 115 MOTION to Dismiss *Plaintiffs' Second Amended Complaint*) *Memorandum of Points and Authorities In Opposition to Defendant Apple's Motion to Dismiss Plaintiffs' Second Amended Consolidated Complaint* filed byEdward W. Hayter, Robert Pepper, Stephen H. Schwartz, Eric Terrell. (Attachments: # 1 Proposed Order Denying Defendant Apple's Motion to Dismiss Plaintiff's Second Amended Complaint)(Schmidt, Alexander) (Filed on 10/15/2013) (Entered: 10/15/2013)

* * *

10/22/2013 118 REPLY (re 115 MOTION to Dismiss *Plaintiffs' Second Amended Complaint*) filed byApple Inc.. (Wall, Daniel) (Filed on 10/22/2013) (Entered: 10/22/2013)

* * *

11/07/2013	121	Minute Entry: Motion Hearing held and submitted on 11/5/2013 before Yvonne Gonzalez Rogers (Date Filed: 11/7/2013) re 115 MOTION to Dismiss *Plaintiffs' Second Amended Complaint* filed by Apple Inc.. (Court Reporter Raynee Mercado.) (fs, COURT STAFF) (Date Filed: 11/7/2013) (Entered: 11/07/2013)

* * *

11/25/2013	123	Transcript of Proceedings held on November 5, 2013, before Judge Yvonne Gonzalez Rogers. Court Reporter Raynee H. Mercado, CSR, Telephone number 510-451-7530, cacsr8258@gmail.com, raynee_mercado@cand.uscourts.gov. Per General Order No. 59 and Judicial Conference policy, this transcript may be viewed only at the Clerks Office public terminal or may be purchased through the Court Reporter until the deadline for the Release of Transcript Restriction.After that date it may be obtained through PACER. Any Notice of Intent to Request Redaction, if required, is due no later than 5 business days from date of this filing. Release of Transcript Restriction set for

		2/24/2014. (Related document(s) 122) (rhm) (Filed on 11/25/2013) (Entered: 11/25/2013)
12/02/2013	124	**ORDER by Judge Yvonne Gonzalez Rogers granting 115 Motion to Dismiss Plaintiff's Second Amended Complaint with Prejudice. (fs, COURT STAFF) (Filed on 12/2/2013) (Entered: 12/02/2013)**
		* * *
12/30/2013	126	Proposed Judgment by Apple Inc. (Yates, Christopher) (Filed on 12/30/2013) Modified on 12/31/2013 (kcS, COURT STAFF). (Entered: 12/30/2013)
12/31/2013	127	NOTICE OF APPEAL to the 9th CCA Edward W. Hayter, Robert Pepper, Stephen H. Schwartz, Eric Terrell. Appeal of Order on Motion to Dismiss 124 (Appeal fee of $505 receipt number 0971-8263870 paid.) (Attachments: # 1 Exhibit A, # 2 Exhibit B)(Rickert, Rachele) (Filed on 12/31/2013) (Entered: 12/31/2013)
01/02/2014	128	USCA Case Number 14-15000 for 127 Notice of Appeal, filed by Stephen H. Schwartz, Robert Pepper, Eric Terrell, Edward W. Hayter. (cjl, COURT STAFF) (Filed on 1/2/2014) (Entered:

		01/02/2014)
01/07/2014	129	**JUDGMENT. Signed by Judge Yvonne Gonzalez Rogers on 1/7/2014. (fs, COURT STAFF) (Filed on 1/7/2014) (Entered: 01/07/2014)**
		* * *
01/12/2017	131	Opinion of USCA as to 127 Notice of Appeal, filed by Stephen H. Schwartz, Robert Pepper, Eric Terrell, Edward W. Hayter. REVERSED AND REMANDED. (cjlS, COURT STAFF) (Filed on 1/12/2017) Modified on 1/13/2017 (vlkS, COURT STAFF). (Entered: 01/12/2017)
		* * *
08/07/2017	133	USCA Case Number 17-204 US Supreme Court (petition for a writ of certiorari) (cjlS, COURT STAFF) (Filed on 8/7/2017) Modified on 6/21/2018 (cpS, COURT STAFF). (Entered: 08/08/2017)
		* * *
06/18/2018	135	ORDER of U.S. Supreme Court: Granting petition for a writ of certiorari as to 133 USCA Case Number 17-204. (cpS, COURT STAFF) (Filed on 6/18/2018) (Entered: 06/21/2018)

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

In re Apple iPhone Antitrust Litigation	)	No. 3:11-06714-YGR
	)	
	)	**AMENDED**
	)	**CONSOLIDATED**
	)	**CLASS ACTION**
	)	**COMPLAINT**
	)	
	)	**DEMAND FOR JURY**
	)	**TRIAL**

Plaintiffs Robert Pepper, Stephen H. Schwartz, Edward W. Hayter, Harry Bass, Eric Terrell, James Blackwell, and Crystal Boykin ("Plaintiffs"), for their class action complaint, allege upon personal knowledge as to themselves and their own actions, and upon information and belief, including the investigation of counsel, as follows:

NATURE OF ACTION

1. This is an antitrust class action pursuant to section 2 of the Sherman Antitrust Act of 1890, 15 U.S.C. § 2 (2004) (the "Sherman Act"), brought by Plaintiffs on their own behalf and on behalf of a class of persons similarly situated, those being persons who purchased an Apple iPhone from Defendant Apple Inc. ("Apple") or non-party AT&T Mobility, LLC ("ATTM"), or elsewhere, and then purchased applications for the iPhone from December 29, 2007 through the present (the "Class Period").

A. Summary Of Material Facts

2. Apple launched its iPhone on or about June 29, 2007. Prior to launch, Apple entered into a secret five-year contract with ATTM that established ATTM as the exclusive provider of cell phone voice and data services for iPhone customers through some time in 2012 ("Exclusivity Agreement"). As part of the contract, Apple shared in ATTM's revenues and profits with respect to the first generation of iPhones launched, known as the iPhone 2G, which was a unique arrangement in the industry. The Plaintiffs and other class members who purchased iPhones did not agree to use ATTM for five years. Apple's undisclosed five-year Exclusivity Agreement with ATTM, however, effectively locked iPhone users into using ATTM for five years, contrary to those users' knowledge, wishes and expectations.

3. To enforce ATTM's exclusivity, Apple, among other things, programmed and installed software locks on each iPhone it sold that prevented the purchaser from switching to another carrier that competed with ATTM in the cell phone voice and data services industry. Under an exemption to the Digital Millennium Copyright Act of 1998, 17 U.S.C. § 1201, *et seq.* (2008) (the "DMCA"), cell phone consumers have an absolute legal right to modify their phones to use the network of their carrier of choice. Apple has prevented iPhone customers from exercising that legal right by locking the iPhones and refusing to give customers the software codes needed to unlock them.

4. Under its Exclusivity Agreement with ATTM, Apple retained exclusive control over the

design, features and operating software for the iPhone. To enhance its iPhone-related revenues, Apple enabled the creation of numerous software programs called "applications," such as ringtones, instant messaging, Internet access, gaming, entertainment, video and photography enabling software that can be downloaded and used by iPhone owners.

5. In March 2008, Apple released a "software development kit" ("SDK") for the stated purpose of enabling independent software developers to design applications for use on the iPhone. For an annual fee of $99, the SDK allows developers to submit applications to be distributed through Apple's applications market, the "iTunes App Store." If the application is not made available for free in the App Store, Apple collects 30% of the sale of each application, with the developer receiving the remaining 70%. On information and belief, throughout the Class Period, Apple refused to "approve" any application by a developer who did not pay the annual fee or agree to Apple's apportionment scheme. Apple also unlawfully discouraged iPhone customers from downloading competing applications software (hereafter "Third Party Apps") by telling customers that Apple would void and refuse to honor the iPhone warranty of any customer who downloaded Third Party Apps.

6. iPhone consumers were not provided a means by which they could download Third Party Apps that were not approved by Apple for sale on the App Store.

7. Through these actions, Apple has unlawfully stifled competition, reduced output and consumer choice, and artificially increased prices in the

aftermarkets for iPhone voice and data services and for iPhone software applications.

B. Summary Of Claims

8. In its July 11, 2012 Order Denying Without Prejudice Defendant's Motion to Compel Arbitration; Granting in Part Defendant's Motion To Dismiss [ECF No. 75], the Court dismissed Plaintiffs' claim of conspiracy to monopolize the iPhone voice and data services aftermarket in violation of Section 2 of the Sherman Act, with the mandate that "insofar as Plaintiffs wish to maintain such claims, ATTM must be added as a party." *Id.* at 16 n.29. Plaintiffs decline to add ATTM as a party, thereby recognizing that the conspiracy to monopolize claim (Count III) will remain dismissed. However, the conspiracy to monopolize claim has been retained in this amended complaint solely and exclusively to preserve the right of Plaintiffs individually and on behalf of the Class as defined in the Consolidated Class Action Complaint to challenge the claim's dismissal on appeal. *See, e.g., Lacey v. Maricopa County,* Nos. 09-15703, 09-15806, 2012 U.S. App. LEXIS 18320, at *67-68 (9th Cir. Aug. 29, 2012) ("For claims dismissed with prejudice and without leave to amend, we will not require that they be repled in a subsequent amended complaint to preserve them for appeal. But for any claims voluntarily dismissed, we will consider those claims to be waived if not repled.").

9. In pursuit and furtherance of its unlawful anticompetitive activities, Apple: (a) failed to obtain iPhone consumers' contractual consent to the five-year Exclusivity Agreement between Apple and ATTM, the effect of which was to lock consumers

into using ATTM as their voice and data service provider, even if they wished to discontinue their use of ATTM service; (b) failed to obtain iPhone consumers' contractual consent to having their iPhones "locked" to only accept ATTM Subscriber Identity Modules ("SIM cards"), thereby preventing iPhone purchasers from using any cell phone voice and data service provider other than ATTM; (c) failed to obtain iPhone consumers' contractual consent to make unavailable to them the "unlock code" that would enable the consumers to use a service other than ATTM, even though ATTM routinely provides such unlock codes for other types of cell phones; and (d) failed to obtain iPhone consumers' contractual consent to Apple prohibiting iPhone owners from downloading Third Party Apps.

10. Apple violated section 2 of the Sherman Act by conspiring with ATTM to monopolize the aftermarket for voice and data services for iPhones in a manner that harmed competition and injured consumers by reducing output and increasing prices in that aftermarket.

11. Apple also violated section 2 of the Sherman Act by monopolizing or attempting to monopolize the software applications aftermarket for iPhones in a manner that harmed competition and injured consumers by reducing output and increasing prices for those applications.

12. Plaintiffs seek declaratory and injunctive relief, treble and exemplary damages, costs and attorneys' fees. As for equitable relief, Plaintiffs seek an order: (a) restraining Apple from selling iPhones that are programmed in any way to prevent or hinder consumers from unlocking their SIM cards or from downloading Third Party Apps; (b) requiring

Apple to provide the iPhone SIM unlock codes to members of the class and other iPhone consumers immediately upon request; and (c) restraining Apple from selling or distributing locked iPhones without adequately disclosing the fact that they are locked to work only with ATTM SIM cards and without obtaining the consumers' contractual consent to have their iPhones locked.[1]

THE PARTIES

13. Plaintiff Robert Pepper is an individual residing in Chicago, Illinois who, on or about June 29, 2007, purchased an iPhone and paid for ATTM voice and data service for his iPhone at ATTM's stated rates during the Class Period.

14. Plaintiff Stephen H. Schwartz is an individual residing in Ardsley, New York who, in October 2010, purchased an iPhone and paid for ATTM voice and data service for his iPhone at ATTM's stated rates during the Class Period.

15. Plaintiff Edward W. Hayter is an individual residing in Brooklyn, New York who, in March 2008, purchased an iPhone and paid for ATTM voice and data service for his iPhone at ATTM's stated rates during the Class Period.

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[1] Apple has released six models of the iPhone to date. From the earliest to most recent, the models are the iPhone 2G, the iPhone 3G, the iPhone 3GS, the iPhone 4, the iPhone 4S and the iPhone 5. Apple created the first three iPhones to operate only on the ATTM wireless network, as part of the Exclusivity Agreement. One version of the iPhone 4 is locked to work only on ATTM's network, while another version, which was released on February 3, 2011, works on Verizon's network. The iPhone 4S and iPhone 5 are designed to be able to operate on ***any*** domestic carrier's network

16. Plaintiff Harry Bass is an individual residing in Brooklyn, New York, who, in December 2008, purchased an iPhone and paid for ATTM voice and data service for his iPhone at ATTM' s stated rates during the Class Period.

17. Plaintiff Eric Terrell is an individual residing in Oakland, California who, on or about June 29, 2007, purchased an iPhone and paid for ATTM voice and data service for his iPhone at ATTM's stated rates during the Class period.

18. Plaintiff James Blackwell is an individual residing in Pinole, California who, in October 2010, purchased an iPhone and paid for ATTM voice and data service for his iPhone at ATTM's stated rates during the Class period.

19. Plaintiff Crystal Boykin is an individual residing in Oakland, California who, in March 2008, purchased an iPhone and paid for ATTM voice and data service for her iPhone at ATTM's stated rates during the Class period.

20. Defendant Apple is a California corporation with its principal place of business located at 1 Infinite Loop, Cupertino, California 95014. Apple regularly conducts and transacts business in this District, as well as throughout Illinois, New York and elsewhere in the United States. Apple manufactures, markets, and sells the iPhone, among other electronic devices.

JURISDICTION AND VENUE

21. This Court has federal question jurisdiction pursuant to the Sherman Act, the Clayton Antitrust Act of 1914, 15 U.S.C. § 15 and pursuant to 28 U.S.C. § 1331 and 1337.

22. This Court also has jurisdiction pursuant to 28 U.S.C. §§ 1332(d)(2) because sufficient diversity of citizenship exists between parties in this action, the aggregate amount in controversy exceeds $5,000,000, and there are 100 or more members of the proposed class.

23. Venue is proper in this District pursuant to 28 U.S.C. § 1391 because some Plaintiffs purchased iPhones in this District, Apple has its principal place of business in this District, a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred here, and Apple is a corporation subject to personal jurisdiction in this District and, therefore, resides here for venue purposes.

24. Each Plaintiff and member of the Class, in order to activate their iPhone, was required to accept the "iPhone Terms and Conditions" (the "Terms"). The Terms state, in pertinent part, that "You expressly agree that exclusive jurisdiction for *any claim or dispute with Apple* or relating in any way to your use of the iTunes Service resides in the courts in the State of California." (emphasis added).

FACTUAL ALLEGATIONS

A. Plaintiffs' Injuries

25. In Spring 2007, Apple began a massive advertising campaign to market its new wireless communication device, the iPhone. The iPhone was advertised as a mobile phone, iPod and "breakthrough" Internet communications device with desktop-class email, an "industry first" "visual voicemail," web browsing, maps and searching capability.

26. The iPhone debuted on June 29, 2007, and despite its hefty $499 or $599 price tag,[2] consumers waited in line to get their hands on one.

27. Pursuant to the secret Exclusivity Agreement between Apple and ATTM described more fully below, during the Class Period the iPhone was sold at both Apple's and ATTM's retail and online stores, among other places.

28. Apple and ATTM entered into a five-year exclusive service provider agreement, which on information and belief was originally scheduled to expire in 2012, although it appears to have been terminated early by Apple before February 2011, when Verizon Wireless began selling voice and data service for the iPhone.

29. Each Plaintiff purchased one or more iPhones. Each Plaintiff also purchased wireless voice and data services from ATTM for their iPhones.

30. Prior to Plaintiffs' purchases of their iPhones and ATTM voice and data services, Apple had not even disclosed – much less obtained the Plaintiffs' contractual consent to – either (a) the existence of Apple's five-year Exclusivity Agreement with ATTM, or (b) that Apple's five-year agreement would effectively lock Plaintiffs into using ATTM as their voice and data service provider for the duration of the five-year agreement. In fact, neither Apple's nor ATTM's sales or customer service representatives were told about the length of the secret Exclusivity Agreement.

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[2] Initially, the 4GB iPhone 2G retailed for $499 and the 8GB iPhone 2G retailed for $599.

31. Prior to Plaintiffs' purchases of their iPhones and voice and data service, Apple had not disclosed – much less obtained Plaintiffs' contractual consent to – the fact (a) that Plaintiffs' iPhones were locked to only work with ATTM SIM cards, or (b) that the unlock codes would not be provided to them on request.

32. On information and belief, ATTM provides unlock codes for cell phones other than the iPhone if requested by a consumer.

33. Plaintiff Pepper wanted to have the option of switching to a competing domestic voice and data service provider other than ATTM.

34. Plaintiff Schwartz would like the ability to unlock his SIM card for international travel and to switch to a competing domestic voice and data service provider other than ATTM.

35. Plaintiff Hayter wanted to have the option of switching to a competing domestic voice and data service provider other than ATTM.

36. Plaintiff Bass wanted to have the option of switching to a competing domestic voice and data service provider other than ATTM.

B. The Cell Phone Industry

37. Cellular telephone service began to be offered to consumers in 1983. Cellular telephones operate using radio frequency channels allocated by the Federal Communications Commission ("FCC"). Geographical service areas, sometimes known as "cells," are serviced by base stations using low-power radio telephone equipment, sometimes known as "cell towers." The cell towers connect to a Mobile Telephone Switching Office ("MTSO"), which

controls the switching between cell phones and land line phones, accessed through the public-switched telephone network, and to other cell telephones.

38. In cellular service there are two main competing network technologies: Global System for Mobile Communications ("GSM") and Code Division Multiple Access ("CDMA"). GSM is the product of an international organization founded in 1987 dedicated to providing, developing, and overseeing a worldwide wireless standard. CDMA is an alternative technological platform, developed by Qualcomm, Inc., used in much of North America and parts of Asia.

39. To enable cell phones to send and receive emails, stream video and provide other services requiring higher data transfer speeds, both CDMA and GSM carriers adopted technologies to comply with what the industry refers to as "3rd or 4th generation," or "3G" or "4G" standards. These technologies require the cell phone to operate on a separate 3G or 4G network. The ATTM services provided to users of the first-generation iPhone were on ATTM's 2G network, whereas later versions of the iPhone operate on 3G and 4G networks.

40. While there are a number of cellular phone service providers in the United States, only four have substantial national networks: ATTM, T-Mobile USA, Inc. ("T-Mobile"), Sprint Corporation ("Sprint"), and Cellco Partnership d/b/a Verizon Wireless ("Verizon") (collectively, the "Major Carriers"). Other suppliers may in effect be "resellers" of cellular telephone service which they purchase from the Major Carriers. ATTM and T-Mobile operate GSM networks, while Sprint and Verizon operate CDMA networks.

41. ATTM and the other wireless carriers have long dominated and controlled the cell phone industry in the United States in a manner that, according to a *Wall Street Journal* article, "severely limits consumer choice, stifles innovation, crushes entrepreneurship, and has made the U.S. the laughingstock of the mobile-technology world, just as the cellphone is morphing into a powerful hand-held computer." Walter S. Mossberg, *Free My Phone*, WALL STREET JOURNAL, Oct. 22, 2007, at R3, col. 1.

42. Unlike the personal computer market in general – where computer manufacturers and software developers can offer products directly to consumers without having to gain the approval of Internet service providers, and without paying those providers a penny – the wireless carriers have used their ability to grant or deny access to their wireless networks to control both the type of cell phone hardware and software that can be manufactured and to extract payments from manufacturers granted access to their networks and customers. *Id.*

43. The anticompetitive nature of the wireless telephone market the carriers have created and facilitated gave rise to the commercial context in which Apple was able to commit the wrongs and offenses alleged herein.

C. The Cell Phone Industry's History Of Misusing Locked SIM Cards

44. In the United States, as a general rule, only GSM phones use SIM cards. The removable SIM card allows phones to be instantly activated, interchanged, swapped out and upgraded, all without carrier intervention. The SIM card itself is tied to the network rather than the actual phone.

Phones that are SIM card-enabled generally can be used with any GSM carrier.

45. Thus, the hardware of all GSM compatible cell phones give consumers some degree of choice to switch among GSM carriers' wireless networks by enabling them to replace their SIM card, a process that the average individual consumer easily can do with no training by following a few simple instructions in a matter of minutes. SIM cards are very inexpensive, now typically costing a few dollars. When the card is changed to the SIM card of another carrier, the cell phone is immediately usable on the other carrier's network. To switch from ATTM to T-Mobile, or the other way around, all that is required is this simple change of the SIM card.

46. For telephone users who travel, particularly to Europe, the ability to change SIM cards to a European carrier such as Orange, Vodaphone or TIM, allows the user of a GSM American phone to "convert it" to a "local" phone in the country where they have traveled. Absent a conversion to local service, a consumer using an American GSM cell phone abroad must pay both for the American service and for "roaming" charges, that is, the right to call or retrieve data from outside of the customer's primary calling area. Roaming charges are typically very high, often a dollar or more a minute. As a result, U.S.-based cell phone users traveling abroad can yield very substantial savings by switching the SIM card and paying for local service rather than using the U.S.-based GSM carrier.

47. In an effort to minimize consumers' ability to switch carriers or avoid roaming charges by simply switching SIM cards, the Major Carriers, acting in concert through trade associations and standards-

setting organizations such as the CDMA Development Group, the Telecommunications Industry Association, the Third Generation Partnership Project, the Alliance for Telecommunications, the Open Mobile Alliance, the CSM Association, the Universal Wireless Communications Consortium, and the Cellular Telephone Industry Association, and otherwise, agreed to implement "Programming Lock" features which effectively "locked" individual handsets so that they could not be used without the "unlocking" code. GSM carriers obtain a locking code (normally only six digits long) unique to each cell phone from the cell phone manufacturer. Absent obtaining the unlocking code from their GSM carrier, consumers who purchase a telephone manufactured to work with one of the two GSM Major Carriers can not switch to another carrier, even temporarily while traveling abroad, without buying an entirely new phone.

48. The two GSM carriers, ATTM and T-Mobile, adopted a SIM-lock standard that locked each GSM phone to a particular SIM card, thereby preventing consumers from simply changing their SIM cards to switch carriers. However, throughout the Class Period both T-Mobile and ATTM (for cell phones other than the iPhone) typically unlocked SIM cards on request for international travel, or even if customers wanted to cancel their accounts and switch to another carrier. In most cases, the unlock code was given on request, almost instantly, over the telephone.

49. Accordingly, ATTM unlocked SIM cards on telephones sold exclusively through them, such as the Blackberry Torch and the Samsung Blackjack.

There is but one exception: the iPhone. Even today, ATTM refuses to provide the unlock code for iPhones for international travel or otherwise.[3] That is because, as described more fully below, Apple and ATTM unlawfully agreed as part of the Exclusivity Agreement that the iPhone would not be unlocked under any circumstances.

D. Apple's Misuse Of Other Locked Program Codes

50. The iPhone operating system also contains "security measures" which are, in effect, Program Locks designed to restrict the consumer from using programs or services on the iPhone other than those sanctioned by, and which generate revenue for, Apple. By design, Apple programmed the iPhone in a manner that prevented iPhone purchasers from downloading any Third Party Apps offered by software manufacturers who did not share their revenues with Apple or pay a fee to Apple to sell through iTunes.

51. However, because of the design of the Apple operating system, which is based on the widely available Unix platform, Apple's initial efforts to

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[3] Despite the fact that the iPhone 4S can be operated on either a GSM or CDMA network, ATTM only allows customers to unlock their iPhones if they meet specific criteria, including having completed the full term of their service agreement. *See* http://www.att.com/esupport!article.jsp?sid=KB414532&cv820#fbid=P8B3TW1-RQ9 (requiring that "All contract obligations, including any term commitment, associated with the device to be unlocked have been fully satisfied."). By contrast, Verizon's iPhone 5 model is already unlocked when sold to customers. *See* http://www.tuaw.com/2012/09/24/verizon-iphone-5-ships-unlocked-likely-thanks-28to-fcc/.

eliminate Third Party Apps and to prevent iPhone customers from unlocking their SIM cards were ineffective, as clever consumers and programmers of Third Party Apps quickly circumvented Apple's locking codes and made both "unlocked" iPhones and "unlocking" software for iPhones available for sale on the Internet.

E. Apple Knows It Cannot Legally Prevent Consumers From Unlocking iPhones

52. Several years ago, the Major Carriers were subject to lawsuits that sought to impose liability based on the existence of Program Locks. Carriers had claimed that Program Locks were necessary to protect their copyrighted intellectual property and claimed then, as Apple has done, that the reason for the locks was to benefit consumers and protect against fraud. Carriers had also sought to assert that under the terms of the DMCA, disabling the Program Locks or unlocking a SIM card would be a violation of law.

53. The DMCA was enacted in 1998 to prohibit third parties from circumventing technological measures (called "access controls") that copyright owners had employed to control access to their protected intellectual property. However, in November 2006, the Librarian of Congress, who by statute has authority to create exemptions to the restrictions in section 1201 of the DMCA to ensure the public is able to engage in noninfringing uses of copyrighted works, announced a three-year exemption from the prohibition against circumvention of access controls for "[c]omputer programs in the form of firmware that enable wireless telephone handsets

to connect to a wireless telephone communication network, when circumvention is accomplished for the sole purpose of lawfully connecting to a wireless telephone communication network." The exemption stemmed from a recommendation by the Register of Copyrights, which concluded that "the access controls [on cell phones] do not appear to actually be deployed in order to protect the interests of the copyright owner or the value or integrity of the copyrighted work; rather, ***they are used by wireless carriers to limit the ability of subscribers to switch to other carriers, a business decision that has nothing whatsoever to do with the interests protected by copyright.***" Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 71 Fed. Reg. 68472, 68476 (Nov. 27, 2006) (emphasis added).

54. In 2009, the Librarian of Congress extended the initial three-year exemption applicable to cell phone access controls on an interim basis. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 74 Fed. Reg. 55138, 55139 (Oct. 27, 2009). On July 27, 2010, the Librarian of Congress issued a final rule to this effect. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 75 Fed. Reg. 43825, 43832 (July 27, 2010).

55. Because Apple was unable to enforce its SIM card Program Locks through legal means, it engaged in a scheme to enforce them unlawfully as to the iPhone.

F. The Apple – ATTM Exclusivity Agreement

56. On January 9, 2007, a little over a month after the initial adverse Librarian of Congress ruling, Apple announced that it had entered into an exclusive agreement making ATTM the only authorized provider of wireless voice and data services for iPhones in the United States. Apple did not announce that the duration of that exclusive agreement was five years.

57. While the terms of that Exclusivity Agreement and any related agreements (collectively, the "Agreement") still have not been made public, some rumored details emerged. First, ATTM and Apple agreed to share ATTM's voice service and data service revenue received from iPhone customers. This was a unique arrangement in the industry and gave Apple strong motivation to force iPhone consumers to continue purchasing voice and data services from ATTM for as long as possible.

58. Second, while ATTM offered iPhone purchasers industry standard monthly voice and data service that could be terminated at any time prior to two years for a fee, Apple had secretly agreed to give ATTM iPhone exclusivity for five years, so that iPhone customers would have no choice but to continue purchasing voice and data services from ATTM until sometime in 2012 in order for their iPhone to continue to operate – even if the customers wanted to terminate their ATTM service early to switch to a less expensive carrier, such as T-Mobile in the United States.

59. Third, on information and belief, Apple and ATTM agreed to enforce ATTM's exclusivity by installing SIM card Program Locks on all iPhones and agreeing never to disclose the unlock codes to iPhone consumers who wished to replace the iPhone SIM card, either for international travel or to lawfully switch to another carrier.

60. Fourth, the Agreement allowed Apple to control the features, content, software programming and design of the iPhone.

61. Fifth, since both Apple and ATTM recognized that the iPhone would create a unique product for which consumers would pay a premium price compared to other cell phones, the pricing structure of the ATTM exclusivity deal was different than a typical agreement between a carrier and a handset manufacturer. Typically, the carrier subsidizes the purchase price of the handset (that is, sells the cell phone to the consumer at a substantial discount off the list price) in return for the consumer purchasing wireless service from the carrier for a period of time. This arrangement, the carriers argue, benefits the consumer by lowering the cell phone's price. The carriers, however, charge an early termination fee if consumers wish to discontinue their purchase of wireless service prior to the agreed upon length of time, which fee the carriers argue is justified by their subsidization of the cell phone price. Upon termination, the cell phone customer can obtain cell phone service from any carrier using the same network protocol (*i.e.*, GSM or CDMA).

62. In Apple's and ATTM's Agreement, ATTM did not agree to subsidize the purchase of the

iPhone handset initially but nevertheless still charged iPhone consumers a fee for terminating their voice and data service within the first two years. The early termination fee by AT'TM was not justifiable absent subsidization of the handset price. The benefits of the termination fee were also illusory because even those iPhone consumers who discontinued their AT'TM voice and data services by paying the early termination fee were prevented from obtaining wireless service for their iPhone from one of AT'TM's competitors domestically or abroad.

63. Sixth, on information and belief, AT'TM and Apple agreed that they would take action, legal or otherwise, to prevent users from circumventing the SIM card locks. A central purpose of this agreement was to suppress lawful competition domestically by T-Mobile against AT'TM in the iPhone aftermarket for voice and data services.

64. Finally, on information and belief, Apple and AT'TM agreed that Apple would be restrained for a period of time from developing a CDMA version of the iPhone to suppress competition by Sprint and Verizon. Apple and AT'TM agreed to this restraint notwithstanding that Apple could easily develop an iPhone for use on CDMA networks. In fact, Apple originally approached Verizon to be the iPhone exclusive service provider before Apple approached AT'TM.

65. None of the above details of the Exclusivity Agreement were disclosed to purchasers of the iPhone, by representatives of Apple and AT'TM or otherwise. Nor did any

iPhone purchaser ever contractually consent to any of those terms upon purchasing their iPhone.

66. On information and belief, Apple and ATTM ceased sharing ATTM's revenues, and reverted to a more traditional carrier-handset manufacturer arrangement whereby ATTM simply purchases the hand-sets from Apple without kicking back its future revenues to Apple, with respect to the iPhone 3G, iPhone 3GS, iPhone 4 and iPhone 4S. Apple and ATTM, however, continued to abide by and enforce the other anticompetitive terms of their Agreement, such as the Program Locks and their refusal to give consumers the unlock codes for their iPhones, in order to continue to suppress competition in the voice and data service aftermarket and to continue to enjoy the supracompetitive profits stemming from their Agreement.

G. Apple And ATTM Quickly Faced Unwanted Competition In The iPhone Aftermarkets

67. Almost immediately after the iPhone 2G was launched, Third Party Apps for the iPhone started to appear that generated competition for Apple in the applications aftermarket and for ATTM in the cellular voice and data service aftermarket. For example, Mobile Chat and FlickIM gave iPhone users access to instant messaging programs from which Apple derived no revenues.

68. Apple also faced competition for iPhone ringtones. When a customer purchased a song for $1 from the Apple iTunes store, Apple charged the customer an additional 99 cents to convert any

portion of that song into a ringtone. A number of competing programmers promptly offered a variety of ringtone programs that enabled iPhone consumers to download both for free. Some of these programs allowed customers to use samples of popular songs lawfully downloaded from Apple's iTunes store as a ringtone for their iPhone. Other programs, such as I-Toner from Ambrosia Software and iPhone RingToneMaker from Efiko software, allowed customers to "clip" portions of songs purchased by them from iTunes for use as ringtones.

69. Since many of these programs used songs downloaded from iTunes, Apple initially sought to block the use of those songs as ringtones by updating the iTunes software to install Program Locks that would interfere with such use. However, those efforts were all quickly defeated by third party programmers, sometimes within hours of the release of the update.

70. The availability of Third Party Apps for iPhones reduced Apple's share of the iPhone aftermarket for ringtones and other applications and greatly reduced or threatened to reduce Apple's expected supracompetitive revenues and profits in that aftermarket.

71. The availability of SIM card unlocking solutions took a little longer and was more complicated. Initially, some customers sought to evade the program lock by altering the hardware. In August 2007, a high-school student announced the first "hardware unlocked" iPhone on YouTube. Shortly thereafter, software unlocks were developed and an explosion of unlock solutions, both free and for a fee, appeared on the Internet.

Many of the solutions involved a small change in the software, in some cases in as little as two bytes of code.

72. The availability of SIM card unlocking solutions enabled iPhone customers to lawfully terminate their AT&TM voice and data service if they were unhappy with AT&TM's service and switch to T-Mobile in the United States, and it enabled iPhone customers to avoid AT&TM's excessive international roaming charges by replacing the AT&TM SIM card with a local carrier's SIM card while traveling.

73. The availability of SIM card unlocking solutions reduced AT&TM's and Apple's share of the iPhone voice and data services aftermarket and threatened to reduce the supra competitive revenues and profits they conspired to earn.

CLASS ALLEGATIONS

74. Plaintiffs bring this action as a class action on behalf of themselves and all others similarly situated for the purpose of asserting claims alleged in this Complaint on a common basis. Plaintiffs' proposed class (hereinafter the "Class") is defined under Federal Rules of Civil Procedure 23(b)(2) and (3), and Plaintiffs propose to act as representatives of the following Class comprised of:

> **All persons, exclusive of Apple and its employees, who purchased an iPhone anywhere in the United States at any time, and who then also purchased applications from Apple from**

December 29, 2007 through the present (the "Class Period").

75. The Class for whose benefit this action is brought is so numerous that joinder of all members is impractical.

76. Plaintiffs are unable to state the exact number of Class members without discovery of Apple's records but, on information and belief, state that tens of millions of iPhones and billions of applications were purchased during the Class Period.

77. There are questions of law and fact common to the Class which predominate over any questions affecting only individual members including whether Apple violated section 2 of the Sherman Act by monopolizing or attempting to monopolize the aftermarket for iPhone software applications.

78. The common questions of law and fact are identical for each and every member of the Class.

79. Plaintiffs are members of the Class they seek to represent, and their claims arise from the same factual and legal basis as those of the Class; they assert the same legal theories as do all Class members.

80. Plaintiffs will thoroughly and adequately protect the interests of the Class, having obtained qualified and competent legal counsel to represent themselves and those similarly situated.

81. The prosecution of separate actions by individual class members would create a risk of inconsistent adjudications and would cause needless expenditure of judicial resources.

82. Plaintiffs are typical of the Class in that their claims, like those of the Class, are based on the same unconscionable business practices, and the same legal theories.

83. Apple has acted on grounds generally applicable to the Class.

84. A class action is superior to all other available methods for the fair and efficient adjudication of the controversy.

RELEVANT MARKET ALLEGATIONS

85. The iPhone is a unique, premium priced product that generates a unique aftermarket for voice and data services and software applications that can be used only on iPhones. During at least the Class Period, the price of iPhones was not responsive to an increase in iPhone service or application prices because: (a) consumers who purchased an iPhone could not, at the point of sale, reasonably or accurately inform themselves of the "lifecycle costs" (that is, the combined cost of the handset and its required services, parts and applications over the iPhone's lifetime); and (b) consumers were "locked into" the iPhone due to its high price tag and would incur significant costs to switch to another handset. The aftermarkets for iPhone voice and data services and applications are thus economically distinct product markets, and the service and application products that are sold within those markets had no acceptable substitutes. The geographic scope of the iPhone voice and data services and applications aftermarkets are national.

86. The aftermarkets for iPhone services and applications include: (a) the aftermarket for

wireless voice and data services (the "iPhone Voice and Data Services Aftermarket"); and (b) the aftermarket for software applications that can be downloaded on the iPhone for managing such functions as ringtones, instant messaging, photographic capability and Internet applications (the "Applications Aftermarket").

87. The iPhone Voice and Data Services Aftermarket came into existence immediately upon the sale of the first iPhones, because: (a) the iPhone Voice and Data Services Aftermarket is derivative of the iPhone market; (b) no Plaintiff or member of the Class contractually agreed to permit Apple to impose any restrictions in this aftermarket; (c) the Plaintiffs and members of the Class were entitled to terminate service with ATTM at any time upon payment of a termination fee; and (d) no Plaintiffs or members of the Class agreed with anyone to not purchase and use voice and data services from providers other than ATTM.

88. Similarly, the Applications Aftermarket came into existence immediately upon the sale of the first iPhones because: (a) the Applications Aftermarket is derivative of the iPhone market; and (b) no Plaintiff or member of the Class agreed to any restrictions on their access to the Applications Aftermarket.

COUNT I

Unlawful Monopolization Of The Applications Aftermarket In Violation Of Section 2 Of The Sherman Act (Seeking Damages And Equitable Relief)

89. Plaintiffs reallege and incorporate paragraphs 1 through 88 above as if set forth fully herein.

90. Apple has acquired monopoly power in the iPhone Applications Aftermarket through unlawful, willful acquisition or maintenance of that power. Specifically, Apple has unlawfully acquired monopoly power by: (a) "approving" only applications that generate revenues for Apple, and/or that are submitted to Apple for approval after the developer pays Apple an annual fee of $99; (b) discouraging iPhone customers from using competing Third Party Apps by spreading misinformation; and (c) programming the iPhone operating system in a way that prevents iPhone customers from downloading Third Party Apps, disables Third Party Apps and/or disables or destroys the full functionality of the iPhones of users who download Third Party Apps.

91. Apple's unlawful acquisition of monopoly power has reduced output and competition and resulted in increased prices for products sold in the iPhone Applications Aftermarket and, thus, harms competition generally in that market.

92. Plaintiffs have been injured in fact by Apple's unlawful monopolization because they have: (a) been deprived of lower cost alternatives for applications; (b) been forced to pay higher prices for Apple "approved" applications; and/or (c) had their iPhones disabled or destroyed.

93. Apple's unlawful monopolization of the iPhone Applications Aftermarket violates section 2 of the Sherman Act, and its unlawful monopolization practices are continuing and will

continue unless they are permanently enjoined. Plaintiffs and members of the Class have suffered economic injury to their property as a direct and proximate result of Apple's unlawful monopolization, and Apple is therefore liable for treble damages, costs and attorneys' fees in amounts to be proved at trial.

COUNT II

Attempted Monopolization Of The Applications Aftermarket In Violation Of Section 2 Of The Sherman Act (Seeking Damages And Equitable Relief)

94. Plaintiffs reallege and incorporate paragraphs 1 through 93 above as if set forth fully herein.

95. Defendant Apple has engaged in exclusionary, predatory and anticompetitive conduct with a specific intent to monopolize the iPhone Applications Aftermarket. Specifically, Apple has attempted unlawfully to acquire monopoly power by: (a) "approving" only applications that generate revenues for Apple, and/or that are submitted to Apple for approval after the developer pays Apple an annual fee of $99; (b) discouraging iPhone customers from using competing Third Party Apps by spreading misinformation; and (c) programming the iPhone operating system in a way that prevents iPhone customers from downloading Third Party Apps, disables Third Party Apps and/or disables or destroys the full functionality of the iPhones of users who download Third Party Apps. Apple did not have a legitimate business justification for any of these actions.

96. Apple's anticompetitive actions have created a dangerous probability that Apple will achieve monopoly power in the Applications Aftermarket because Apple has already unlawfully achieved an economically significant degree of market power in that market and has effectively foreclosed new and potential entrants from entering the market or gaining their naturally competitive market shares.

97. Apple's attempted acquisition of monopoly power has reduced output and competition and resulted in increased prices for products sold in the iPhone Applications Aftermarket and, thus, harms competition generally in that market.

98. Plaintiffs have been injured in fact by Apple's attempted monopolization because they have: (a) been deprived of lower cost alternatives for applications; (b) been forced to pay higher prices for Apple "approved" applications; and/or (c) had their iPhones disabled or destroyed.

99. Apple's attempted monopolization of the iPhone Applications Aftermarket violates section 2 of the Sherman Act, and its anticompetitive practices are continuing and will continue unless they are permanently enjoined. Plaintiffs and members of the Class have suffered economic injury to their property as a direct and proximate result of Apple's attempted monopolization, and Apple is therefore liable for treble damages, costs and attorneys' fees in amounts to be proved at trial.

COUNT III [PRESERVED FOR APPEAL]

Conspiracy To Monopolize The iPhone Voice And Data Services Aftermarket In Violation

Of Section 2 Of The Sherman Act (Seeking Damages And Equitable Relief)

100. Plaintiffs reallege and incorporate paragraphs 1 through 99 above as if set forth fully herein.

101. Apple knowingly and intentionally conspired with ATTM with the specific intent to monopolize the iPhone Voice and Data Services Aftermarket. In furtherance of the conspiracy, Apple and its co-conspirator agreed without Plaintiffs' knowledge or consent to make ATTM the exclusive provider of voice and data services for the iPhone for five years, contrary to Plaintiffs' reasonable expectations that they could switch at any time to another carrier in the first two years that they owned their iPhone after paying the $175 early termination fee, and without charge after that period.

102. ATTM unlawfully achieved an economically significant degree of market power in the iPhone Voice and Data Services Aftermarket as a result of the conspiracy and effectively foreclosed new and potential entrants from entering the market or gaining their naturally competitive market shares.

103. Apple and ATTM's conspiracy reduced output and competition and resulted in increased prices in the iPhone Voice and Data Services Aftermarket and, thus, harmed competition generally in that market.

104. Plaintiffs were injured in fact by Apple and ATTM's conspiracy because they were: (a) deprived of alternatives for voice and data services domestically; and (b) forced to pay

supracompetitive prices for iPhone voice and data services.

105. Apple's conspiracy to monopolize the iPhone Voice and Data Services Aftermarket violated Section 2 of the Sherman Act, and its anticompetitive practices are continuing and will continue unless they are permanently enjoined. Plaintiffs and members of the Class have suffered economic injury to their property as a direct and proximate result of Apples' conspiracy, and Apple is therefore liable for treble damages, costs and attorneys' fees in amounts to be proven at trial.

WHEREFORE, Plaintiffs respectfully request that the Court enter judgment against Apple as follows:

a. Permanently enjoining Apple from selling locked iPhones that can only be used with ATTM SIM cards unless such information is adequately disclosed to consumers prior to sale;

b. Ordering Apple to provide the unlock code upon request to all members of the Class who purchased an iPhone prior to the disclosures described above;

c. Permanently enjoining Apple from monopolizing or attempting to monopolize the iPhone Applications Aftermarket;

d. Permanently enjoining Apple from conspiring to monopolize the iPhone Voice and Data Services Aftermarket;

e. Awarding Plaintiffs and the Class treble damages for injuries caused by Apple's violations of the federal antitrust laws;

f. Awarding Plaintiffs and the Class reasonable attorneys' fees and costs; and

g. Granting such other and further relief as the Court may deem just and proper.

DEMAND FOR TRIAL BY JURY

Plaintiffs hereby demand a trial by jury.

DATED: September 28, 2012

WOLF HALDENSTEIN ADLER FREEMAN & HERZ LLP
FRANCIS M. GREGOREK
RACHELE R. RICKERT

/s/ Rachele R. Rickert
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Plaintiffs' Interim Class Counsel

[DECLARATION OF SERVICE omitted]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

IN RE APPLE IPHONE ANTITRUST LITIGATION	CASE NO. C 11-06714-YGR RELATED CASE NO. C 07-05152-JW **DEFENDANT APPLE'S NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' AMENDED CONSOLIDATED COMPLAINT** Date: December 18, 2012 Time: 2:00 P.M. Place: Courtroom TBD The Honorable Yvonne Gonzalez Rogers

* * *

VI. THE APPS ANTITRUST CLAIMS MUST BE DISMISSED

A. The Factual Allegations

* * *

. . . Paragraph 5 summarizes the restrictions that Plaintiffs apparently take issue with: (1) that developers use a particular SDK if they want to distribute apps through the App Store and the $99

charge for the SDK; (2) that developers submit Apps to Apple for review and approval prior to being made available on the App Store; and (3) that developers pay Apple 30% of the sales price of any paid App sold through the App Store. Compl. ¶ 5.

This information was prominently announced by Apple. Indeed, the allegations in paragraph 5 of the Complaint refer to Apple's March 2008 announcement regarding the creation of its App Store, which set forth the terms under which Apps would be made available to iPhone owners:

> The App Store enables developers to reach every iPhone and iPod touch user. **Developers set the price for their applications—including free—and retain 70 percent of all sales revenues.** Users can download free applications at no charge to either the user or developer, or purchase priced applications with just one click. Enterprise customers will be able to create a secure, private page on the App Store accessible only by their employees. Apple will cover all credit card, web hosting, infrastructure and DRM costs associated with offering applications on the App Store. **Third party iPhone and iPod touch applications must be approved by Apple and will be available exclusively through the App Store.**

Request for Judicial Notice ("RJN"), Ex. 1 (emphasis added).[4]

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[4] As set forth in greater detail in Apple's accompanying Request for Judicial Notice, the Court may take judicial notice

* * *

B. Plaintiffs Do Not Have Standing To Pursue Their Apps Claims

* * *

2. Plaintiffs Are Indirect Purchasers And Lack Antitrust Standing Under *Illinois Brick*

* * *

. . . This is incurable. Plaintiffs are, if anything, Apps consumers—not Apps developers. *E.g.*, Compl. ¶¶ 13-19. Consumers download Apps available through Apple's App Store. Plaintiffs' complaint is that consumers are indirect victims of Apple's policies because (a) Apple restricts developers in various ways, (b) this leads to fewer or more expensive Apps, and (c) consumers suffer accordingly. Compl. ¶¶ 5-7. In fact, Plaintiffs assert that because *developers* must pay Apple a $99 yearly developer fee and 30% of each paid App, the putative class has been injured because it has "(a) been deprived of lower cost alternatives for applications; (b) been forced to pay higher prices for Apple "approved" applications; and/or (c) had their iPhones disabled or destroyed." Compl. ¶ 92.

The problem with this reasoning is that it runs straight into the rule established by the Supreme

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of Apple's press releases, especially where, as here, the Complaint purports to summarize portions of them. *Yang v. Dar Al-Handash Consultants*, 250 Fed. Appx. 771, 772 (9th Cir. 2007); *see also Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005).

Court in *Illinois Brick*, that *indirect* victims of anticompetitive conduct do not have standing to bring the claim. 431 U.S. at 730-31, 734. As the Ninth Circuit recently made clear, "a bright line rule emerged from *Illinois Brick*: only direct purchasers have standing under § 4 of the Clayton Act to seek damages for antitrust violations." *In re ATM Fee Antitrust Litig.*, 686 F.3d at 748.

* * *

Here, Apple's alleged wrongful conduct restricts developers. Everything else that follows is an indirect effect. The developer sets the price of the Apps and, in accordance with Apple's App Store policies, the developer pays Apple 30% of the price of any downloaded Apps. It is that antecedent transaction between Apple and the developer that the Complaint asserts causes an unlawful increase in the price of Apps, which means that Plaintiffs are indirect purchasers. The antecedent nature of the $99 annual developer fee is even more clear: these are fees that the developers owe and thus pay directly to Apple, without any involvement by consumers. Plaintiffs lack antitrust standing to bring their Apps claims in this Court, and there is no amendment that can cure this failing. The Apps claims should be dismissed with prejudice.

C. Plaintiffs Fail To Plead The Requisite Elements Of Their Antitrust Claims

2. Plaintiffs Fail To Allege Unlawful Anticompetitive Conduct

* * *

Plaintiffs' allegations are about a collection of policies whereby Apple provides a platform for the development and distribution of Apps for the iPhone. Apple has always been very clear about its view that the iPhone platform would be better and more competitive if Apps were approved by Apple and downloaded through a safe and secure App Store free of pornography, malware, and content that could harm cellular networks. So the few factual allegations that Plaintiffs make about Apple's Apps policies, drawn from Apple's press releases, were and are well known: developers must submit Apps to Apple for approval, approved Apps are only to be distributed through the App Store, Apple gets 30% of the price of paid Apps (and nothing with respect to free Apps), and iPhones, by design, do not provide iPhone customers with a means to download Apps other than from Apple's App Store. Compl. ¶¶ 5-7.[10]

* * *

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[10] To be clear, while it is true that developers are restricted by policy from distributing the particular software embodiment of their Apps intended solely for loading onto Apple's devices (i.e., the version of the App designed, programmed and intended solely for Apple devices) through portals other than the App Store, there are no allegations that this is a restriction on any developer's right or ability to create and distribute versions of the very same applications programmed to work with different operating system platforms. Nor could there be—there are innumerable examples of developers creating versions of popular Apps (*e.g.*, Facebook) for the many platforms that compete with Apple (*e.g.*, Google Android). And consumers are of course free to choose that competing platform and access the very same software applications, to the extent a developer has chosen to create a version of their application for the alternate platforms.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

IN RE APPLE & AT&T IPHONE ANTITRUST LITIGATION	Case No. C 11-06714-YGR Related Case No. C 07-05152-JW **PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT APPLE'S MOTION TO DISMISS THE AMENDED CONSOLIDATED COMPLAINT** DATE: January 15, 2013 Time: 2:00 P.M. CRTRM: TBD JUDGE: Hon. Yvonne Gonzalez Rogers

* * *

C. **Apple's Arguments in Any Event Lack Merit**

1. **Plaintiffs are Direct Purchasers with Antitrust Standing**

. . . The Amended Complaint plainly alleges that Plaintiffs purchased ***directly from Apple*** certain Apps that were ***made by Apple itself***, Compl. ¶¶ 63-66, such as songs converted into ringtones, for

which "Apple charged the customer an additional 99 cents," *id.* ¶ 64. Plaintiffs also allege that iPhone consumers were forced to buy third party developers' applications ***directly from Apple's Apps Store***, and that iPhone consumers were forced ***to pay Apple*** a 30% fee on top of the cost for the apps. *Id.* at ¶¶ 4-5.

* * *

Apple admits that Plaintiffs are "Apps consumers" – that is, Apps purchasers – (*see* Def. Mem. at 9), but then completely ignores Plaintiffs' allegations about Apple's own-manufactured apps, which are made only by Apple and sold only by Apple. Plaintiffs undoubtedly are direct purchasers of those apps. Apple then attempts to convolute Plaintiffs' allegations about third-party apps to make it appear as though the apps developers, rather than iPhone consumers, were the direct purchasers of third-party apps. *See* Def. Mem. at 9. Putting aside that Apple's illogical version bears little resemblance to what Plaintiffs actually allege, Apple's argument still fails to identify an indirect purchase because under Apple's argument the developers are not purchasers of the apps at all: the developers ***make*** the third-party apps, they do not buy them from Apple. The only purchasers of apps are iPhone consumers, who must purchase third party apps – the tainted product – directly from Apple exclusively on its Apps Store. And iPhone consumers pay the challenged supracompetitive 30% fee directly to the Apps Store at the time of purchase.

As the Ninth Circuit has recently reiterated in the case that Apple itself relies upon, the *sine qua non* for direct purchaser status is ***whether the***

plaintiff paid the alleged unlawful fee directly to the alleged wrongdoer. *In re ATM Fee Antitrust Litig.*, 686 F.3d at 746, 751 (upholding district court's finding of indirect purchaser status where the plaintiffs admitted they "did not directly pay the alleged fixed interchange fees" to the alleged wrongdoer). Under the Ninth Circuit's straightforward standing test, because Plaintiffs paid the alleged unlawful price – here Apple's 30% fee – directly to Apple (the alleged monopolist), they are direct purchasers and have standing to sue Apple under Ninth Circuit jurisprudence. *Id.* at 754.

Apple mistakenly focuses on the $99 annual fee that apps developers pay Apple for the right to distribute their apps through Apple's Apps Store to argue that the developers, too, are "victims" of Apple, in an effort to twist the facts here to resemble those in the Eighth Circuit's *Campos v. Ticketmaster* case. Here, of course, Plaintiffs do not challenge the $99 fee that the developers paid to Apple since Plaintiffs never paid that fee themselves. Rather, Plaintiffs challenge only the 30% fee that they paid directly to Apple. That the developers may also be victims of Apple as to the $99 annual fee is completely irrelevant to whether Plaintiffs are direct purchasers as to the totally distinct 30% apps fee under Ninth Circuit law.

* * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

IN RE APPLE IPHONE ANTITRUST LITIGATION	CASE NO. C 11-06714-YGR Related Case Nos. C 07-05152-JW and C 11-06714-YGR
ZACK WARD and THOMAS BUCHAR, on behalf of themselves and all others similarly situated, Plaintiffs, v. APPLE INC., Defendant	**REPLY IN SUPPORT OF DEFENDANT APPLE INC.'S MOTION TO DISMISS PLAINTIFFS' AMENDED CONSOLIDATED COMPLAINT** Date: January 15, 2013 Time: 2:00 P.M. Place: Courtroom 5 The Honorable Yvonne Gonzalez Rogers

* * *

I. INTRODUCTION

* * *

. . . The Complaint alleges that Apple "artificially increased" prices for Apps through an

"apportionment scheme" whereby App developers agree to pay Apple 30% of the sales price of Apps. This allegation is fatal to Plaintiffs' standing. These Plaintiffs do not have antitrust standing under the Supreme Court's *Illinois Brick* decision since the 30% fee that supposedly leads to the "artificially inflated" prices for Apps is a separate arrangement between the App developer and Apple. The Ninth Circuit recently held in *In re ATM Fees Antitrust Litigation* that *Illinois Brick* barred a substantively identical challenge to a fee arrangement between banks that allegedly led to an overpayment by consumers.

* * *

V. PLAINTIFFS' APPS CLAIMS FAIL AND MUST BE DISMISSED

A. Plaintiffs Do Not Have Antitrust Standing

* * *

Plaintiffs now assert that "iPhone consumers were forced ***to pay Apple*** a 30% fee on top of the cost for the apps." (Opp. at 11 (emphasis Plaintiffs', citing Complaint ¶¶ 4-5).) The plain import of this is that Apple takes the price for an App set by the developer and adds to it, the way a retailer might add sales tax to the price of an item, a 30% fee. That does not matter legally, as the *Ticketmaster* decision makes clear.[4] But plaintiffs have a more fundamental problem because paragraphs 4 and 5 of

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[4] *See Campos v. Ticketmaster Corp.*, 140 F.3d 1166 (8th Cir. 1998).

the Complaint, which they cite, make no mention of a fee paid by consumers on top of the cost for the Apps. Indeed, nowhere in the complaint is such a fee mentioned.[5] This is not an accident because there is no good faith basis to allege that. Plaintiffs acknowledge that *Apple does not charge consumers a 30% fee on top of the cost for the Apps*; rather, Apple *charges developers* a 30% fee on Apps that they elect to offer as "paid" on the App Store (Apple charges nothing on Apps that the developers elect to offer as free). Complaint ¶ 5; Mot. Dismiss at 7.

The whole thrust of the Complaint is about "Apple's apportionment scheme" for sales revenue earned by third party developers of Apps. Complaint ¶ 5. Plaintiffs acknowledge that "[d]evelopers set the price of their applications—including free" (RJN Ex. 1), but they surmise that because developers only "retain 70 percent of all sales revenues" (*id.*; Complaint ¶ 5), *developers* have an incentive to charge higher prices to consumers for their apps, resulting in "artificially increased prices . . . for iPhone software applications." Complaint ¶ 7. The pleadings thus acknowledge that the developer turns over 30% of the price it sets to Apple.

This is what makes ***ATM Fee*** directly on point.[6] The plaintiffs in that case challenged bank

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[5] By contrast, fees that actually were paid by certain class members to ATTM, such as "roaming charges" and the "early termination fee," are discussed in the Complaint. *See* Complaint ¶¶ 46, 47, 61, 62, 87, 101.

[6] ***ATM Fee*** issued long after Judge Ware's class certification order which contains the quotation cited by Plaintiffs in which Judge Ware pointed to a lack of Ninth Circuit authority. (*See* Opp. at 5.) There is now controlling Ninth Circuit authority,

"interchange fees" that they did not pay but which they claimed led to higher foreign ATM fees that they did pay: "Plaintiffs concede that they have never directly paid interchange fees. Instead, card-issuing banks (including Bank Defendants) pay interchange fees and then include them when they charge foreign ATM fees (alleged by Plaintiffs to be artificially inflated). In other words, the Bank Defendants pass on the cost of the interchange fees through the foreign ATM fees." *Id.* at 750-51. Even though the plaintiffs did directly pay allegedly inflated ATM fees (because the banks supposedly passed on the interchange fee), the Ninth Circuit held that the claims were barred by *Illinois Brick*. *Id.*

Plaintiffs' theory is identical: the "apportionment scheme" supposedly leads Apps developers to "pass on" the 30% fee by charging higher prices for their Apps—just as the bank interchange fees were allegedly "passed on" and led to higher ATM fees in *ATM Fees*. Plaintiffs' complaint is thus barred by *Illinois Brick* because Apps developers are the proper party to sue over a claim concerning the "apportionment scheme." *Id.*[7]

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never considered by Judge Ware, that mandates dismissal of Plaintiffs' claims for lack of antitrust standing.

[7] Plaintiffs raise a strawman by claiming that Apple contends developers are the "direct purchasers" of Apps. (Opp. at 12.) That is not the case. Apple simply takes the legally correct and factually obvious position that developers are the party directly involved in the antecedent transaction that Plaintiffs complain of: the "apportionment scheme" with Apple. Complaint ¶ 5.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE YVONNE GONZALEZ ROGERS, JUDGE

IN RE APPLE IPHONE ANTITRUST LITIGATION	)	PAGES 1 – 22
	)	No. C 11-06714 YGR
	)	OAKLAND, CALIFORNIA
	)	TUESDAY, MARCH 5, 2013

TRANSCRIPT OF PROCEEDINGS

* * *

[2]

* * *

... IN LIGHT OF SOME OF THE PROCEDURAL OBJECTIONS, I WAS GOING TO SUGGEST WE JUST FOCUS ON TWO ISSUES WHICH I THINK MINIMIZE ANY OF THE -- THE PROCEDURAL ISSUES. AND THOSE ARE THE ILLINOIS BRICK ISSUE, THE INDIRECT [3] PURCHASER ISSUE, AND THEN -- THE QUESTION OF WHETHER THEY'VE STATED A CLAIM FOR ANTICOMPETITIVE CONDUCT.

WE ARE -- JUDGE WARE DID A LOT IN THE PRIOR LITIGATION, BUT ONE THING HE DID NOT HAVE THE BENEFIT OF WAS THE NINTH CIRCUIT'S DECISION IN THE ATM CASE

BECAUSE IT HADN'T COME OUT AT THE TIME THAT HE ONLY -- THE ONLY TIME HE REFERENCED THE INDIRECT PURCHASER ISSUE, WHICH WAS, ODDLY ENOUGH, IN A CLASS CERTIFICATION MOTION.

AND SINCE THEN, THE ATM DECISION HAS COME DOWN, AND IT -- IT REALLY ELIMINATED JUDGE WARE'S CONCERN THAT THE NINTH CIRCUIT HADN'T REALLY ADDRESSED THE QUESTION THAT IT PRESENTED BY THEIR APPLICATIONS CLAIM, AND THAT IS WHAT HAPPENS WHEN THERE'S AN ALLEGED ANTICOMPETITIVE ACT THAT IMPOSES A COST ON SOMEONE WHO MAKES SOMETHING AND THEN PUTS IT INTO -- INTO -- INTO COMMERCE.

AND SO THE FACTS THERE – WE ALL CAN RELATE TO THIS BECAUSE WE ALL HAVE ATM CARDS. WHEN YOU GO AND -- SAY, IF YOU'RE A WELLS FARGO BANK CARDHOLDER AND YOU HAPPEN TO NOT BE ABLE TO FIND A WELLS FARGO. YOU CAN GO TO ANOTHER MACHINE, BUT YOU'RE GOING TO BE CHARGED A COUPLE OF FEES. ONE OF THEM IS A SURCHARGE FEE, WHICH IS ACTUALLY CHARGED BY WHOEVER OWNS THE ATM FEE (SIC), BUT YOU'RE ACTUALLY ALSO CHARGED A FEE BY YOUR OWN BANK. YOUR OWN BANK CHARGES YOU WITH SOMETHING -- SOMETHING CALLED A FOREIGN ATM FEE. AND THE ALLEGATION IS THAT'S A LITTLE HIGHER THAN IT SHOULD HAVE BEEN BECAUSE THE [4] BANK IS PAYING SOMETHING CALLED AN INTERCHANGE FEE

AS PART OF ITS PARTICIPATION IN AN ATM NETWORK.

AND THE PLAINTIFFS IN THAT CASE WERE A CLASS OF CONSUMERS, AS HERE. THEY TRIED TO SAY THAT THEY WERE ABLE TO AVOID THE INDIRECT PURCHASER DOCTRINE BECAUSE THEY ACTUALLY WERE THE ONES WHO PUT THEIR CARD INTO THE MACHINE AND HAD TO PAY THE FEE.

BUT THE NINTH CIRCUIT SAYS, THAT'S NOT REALLY WHAT'S -- WHAT THE GRAVAMEN OF THE COMPLAINT IS. THE GRAVAMEN OF THE COMPLAINT IS THAT SOMETHING THAT HAPPENED BEFORE THAT IS AFFECTING THE PRICE OF THAT FEE. THAT'S AN INDIRECT PURCHASER CLAIM. IT'S BARRED BY ILLINOIS BRICK.

NOW, IN THIS CASE, THE APPS CLAIMS, WHICH ARE THE ONLY CLAIMS THAT CAN REALLY REMAIN IN THIS AFTER THEIR DECISION NOT TO NAME AT&T AS A PLAINTIFF -- OR IF ANYTHING, A STRONGER VERSION OF THOSE FACTS. AND, AGAIN, WE ALL PROBABLY HAVE SOME COMMON EXPERIENCE ABOUT THIS.

IF YOU WANT TO PLAY "ANGRY BIRDS"," YOU CAN YOU GO TO THE APP. STORE, AND YOU CAN BUY IT. THE PRICE FOR THAT IS SET BY WHOEVER IT IS WHO MAKES "ANGRY BIRDS." IT'S NOT SET BY APPLE. IT'S SET BY WHOEVER MAKES "ANGRY BIRDS." BUT IN ORDER TO USE THE APP. STORE, THEY'RE GOING -- BECAUSE IT'S A PAID APP RATHER

THAN A FREE APP, THEY WILL HAVE TO TURN OVER 30 PERCENT OF WHATEVER THEY DECIDE TO CHARGE TO APPLE. THAT'S WHAT'S STATED IN PARAGRAPH 5 OF THE COMPLAINT. AND ON ACCOUNT OF [5] THAT, THE IDEA IS THAT THEY WILL RATIONALLY SET A DIFFERENT PRICE THAN THEY WOULD HAVE CHARGED IF DISTRIBUTION WERE FREE.

THAT'S EXACTLY THE SAME MODEL -- THE KEY POINT UNDER THE NINTH CIRCUIT'S ATM DECISION IS THAT APPLE ISN'T SETTING THE PRICE OF "ANGRY BIRDS." SOMEBODY ELSE IS.

AND AS A RESULT OF -- OF THAT, THE -- IT -- THAT PERSON'S CUSTOMER, WHICH ARE THESE PLAINTIFFS, IS AN INDIRECT PURCHASER, NOTWITHSTANDING THE FACT THAT THEY'RE ACTUALLY MAKING THE DEAL, BUYING IT THROUGH APPLE AND PAYING APPLE IN THE FIRST INSTANCE.

THE PLAINTIFFS IN THE ATM -- PAID THE BANK THROUGH THE CREDIT CARD. THE MERCHANTS IN THE KENDALL VS. VISA CASE--

* * *

MR. SCHMIDT: YOUR HONOR, IT'S -- IT'S BLACK LETTER LAW THAT AN INDIRECT PURCHASER IS SOMEONE WHO BUYS AFTER THE DIRECT PURCHASER BUYS. AND WHAT THEY BUY IS THE TAINTED PRODUCT. HERE, THE TAINTED -- THE TAINTED FEE, THE FEE

SET BY THE MONOPOLIST APPLE IS THE 30 PERCENT FEE THAT APPLE CHARGES.

THE COURT: THE PRODUCT IS WHAT?

MR. SCHMIDT: IT'S NOT THE PRICE FOR THE "ANGRY BIRDS." **[6]**

THE COURT: NO, THE PRODUCT IS THE BIRD, ISN'T IT? ISN'T IT THE PROGRAM? YOU'RE NOT JUST PAYING 30 PERCENT. ISN'T THE PROGRAM ITSELF THE PRODUCT THAT IS BEING PURCHASED?

MR. SCHMIDT: YES. THE APPS ARE BEING PURCHASED, BUT APPLE ISN'T BUYING THE APP SO APPLE'S NOT THE PURCHASER. APPLE CANNOT BE A DIRECT PURCHASER IF IT'S NOT BUYING APPS.

THE COURT: ALL RIGHT.

MR. SCHMIDT: ONLY THE CONSUMER BUYS THE APPS. YES, IT BUYS IT THROUGH THE APPLE STORE BUT IF IT WERE PERMITTED TO BUY "ANGRY BIRDS" DIRECTLY FROM THE MANUFACTURER, THEN IT WOULDN'T HAVE TO PAY -- THE CONSUMER WOULDN'T HAVE TO PAY THE 30 PERCENT FEE THAT --

* * *

MR. WALL: THE CONSUMER IS -- IS USING THE APP. STORE APP. STORE -- APPLE'S APP STORE, MUCH LIKE THE -- THE ATM USER IS USING THE CITIBANK MACHINE.

THE COURT: OKAY. SO THIS ISN'T -- IT'S A NOT A BRICKS-AND-MORTAR KIND OF

COROLLARY. IT'S NOT AS IF APPLE'S PURCHASING THEM THEMSELVES AND THEN RESELLING THEM. YOUR ARGUMENT IS IT'S AN INTERMEDIARY BETWEEN WHAT'S BEING PURCHASED.

MR. WALL: THEY'RE COMPLAINING -- WHAT THEIR COMPLAINT SAYS IS THAT BECAUSE APPLE IMPOSES THIS DISTRIBUTION [7] FEE OF 30 PERCENT ON PAID APPS -- AGAIN, FREE APPS DON'T HAVE ANY FEE ASSOCIATED WITH THEM. BUT BECAUSE APPLE PUTS THIS FEE IN PLACE, IT -- LIKE ANY OTHER DISTRIBUTION COST, IT WILL MAKE THE SELLER OF THE PRODUCT CHANGE THEIR PRICE.

* * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE APPLE IPHONE ANTITRUST LITIGATION	)	Case No. 11-06714-YGR
	)	**ORDER GRANTING APPLE'S MOTION TO DISMISS CONSOLIDATED COMPLAINT**

Pending before the Court is Defendant Apple's Motion to Dismiss Plaintiffs' Amended Consolidated Complaint. (Dkt. No. 88.)[1] Plaintiffs allege antitrust claims based on unlawful monopolization and attempted monopolization of an aftermarket for iPhone applications in violation of section 2 of the Sherman Act ("Section 2"). Plaintiffs allege a third claim for conspiracy to monopolize an iPhone voice and data services aftermarket in violation of Section 2 to preserve their ability to challenge the previous dismissal of that claim.

Having carefully considered the papers submitted and the pleadings in this action, the arguments of counsel, and for the reasons set forth below, the Court hereby **GRANTS** Apple's Motion to Dismiss **WITH LEAVE TO AMEND** and **GRANTS** Apple's Motion to Strike.

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[1] Apple's Motion to Dismiss contains a request to strike certain allegations pursuant to Fed. R. Civ. P. 12(f). The Court will refer to the request to strike as the "Motion to Strike."

I. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND[2]

A. *In re Apple & AT&TM Antitrust Litigation*, Case No. 07-05152 ("*Apple I*")

Prior to the instant action, the Honorable James Ware presided over another class action involving defendants Apple and AT&T Mobility, LLC. (*In re Apple & AT&TM Antitrust Litigation*, Case No. 07-05152 ("*Apple I*").) In *Apple I*, plaintiffs alleged five claims for violation of federal antitrust statutes, in addition to violations of consumer protection laws. (*See* Dkt. No. 109 [Revised Consolidated Amended Class Action Complaint ("*Apple I* Complaint")].)[3]

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[2] The following background section is not intended to provide an exhaustive factual or procedural summary of this action or any related actions summarized herein.

[3] The *Apple I* plaintiffs alleged that prior to the launch of the iPhone on or about June 29, 2007, Apple entered into a "secret" five-year contract with AT&TM, under which AT&TM would be the exclusive provider of cell phone voice and data services for iPhone customers through 2012. (*Apple I* Complaint ¶ 2.) Plaintiffs alleged they and class members purchased iPhones and agreed to enter into a two-year voice and/or data service plan with AT&TM, but did not agree to use those services for five years. (*Id.*) In effect, the undisclosed five-year exclusivity agreement locked iPhone users into using AT&TM for five years, contrary to users' contractual expectations. (*Id.*) In addition, plaintiffs alleged that Apple "created a number of software programs called 'applications,' such as ring tone, instant messaging, Internet access, and video and photography enabling software that can be downloaded and used by iPhone owners." (*Id.* ¶ 4.) Apple entered into agreements with software manufacturers by which Apple approved their software applications for iPhone use in exchange for a share of the manufacturer's revenues. (*Id.*) Apple allegedly discouraged iPhone customers from

Plaintiffs alleged that Apple and AT&TM violated Section 2 of the Sherman Act in two ways: first, by "monopolizing, attempting to monopolize or conspiring to monopolize the aftermarket for voice and data services for iPhones in a manner that harmed competition and injured consumers by reducing output and increasing prices for those aftermarket services." (*Id.* ¶ 10.) Second, Plaintiffs alleged Apple "monopoliz[ed] or attempt[ed] to monopolize the software applications aftermarket for iPhones in a manner that harmed competition and injured consumers by reducing output and increasing prices for those applications." (*Id.* ¶ 11.)

Apple moved to dismiss the Section 2 claims because Plaintiffs had "neither alleged legally cognizable markets under the Sherman Act, nor legally sufficient monopolization of those markets." (Order Denying Defendant AT&TM's Motion to Compel Arbitration and to Dismiss; Denying Defendant AT&TM's Motion to Stay Discovery; Granting in Part and Denying in Part Defendant Apple's Motion to Dismiss [*Apple I*, Dkt. No. 144] at 12.) Judge Ware held that plaintiffs had sufficiently alleged relevant aftermarkets, market power, and monopolization for both the voice and data services and applications aftermarkets to state a claim. (*Id.* at 15–19.) In the same order, Judge Ware also denied AT&TM's motion to compel arbitration. (*Id.* at 6–10.)

Plaintiffs moved for class certification in January 2010. (*See* Dkt. Nos. 240 & 289; Order Granting

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downloading competing third-party application software by refusing to honor warranties if customers downloaded competing applications. (*Id.*)

Defendant Apple's Motion for Summary Judgment; Granting in Part Plaintiffs' Motion for Class Certification; Denying Folkenflik & McGerity's Motion for Appointment as Co-Lead Counsel [Dkt. No. 466] at 2 n.2.) The court certified a class of "[a]ll persons who purchased or acquired an iPhone in the United States and entered into a two-year agreement with Defendant AT&T Mobility, LLC for iPhone voice and data service any time from June 29, 2007, to the present." (*Id.* at 25.)

Following the decision in *AT&T Mobility LLC v. Concepcion*, the Court permitted defendants to file motions to compel arbitration and to decertify the class. (*See* Dkt. Nos. 502, 504, 511 & 514.) On December 1, 2011, Judge Ware issued an Order Granting Motions to Compel Arbitration and Granting Motions to Decertify Class. (Dkt. No. 553.) On December 14, 2011, plaintiffs filed a Motion for Leave to Seek Reconsideration and/or in Addition to Amend the Order to Certify for Immediate Interlocutory Appeal. (Dkt. No. 554.) The Court certified "its December 1 Order for interlocutory appeal solely as to the issue of whether a non-signatory defendant may assert equitable estoppel against a signatory plaintiff." (Dkt. No. 564 at 12.) The Ninth Circuit denied plaintiffs' petition for permission to appeal on April 27, 2012. (Dkt. No. 570.)

B. The Instant Action ("*Apple II*")

1. Procedural Background

Plaintiffs Robert Pepper, Stephen Schwartz, Edward Hayter, and Harry Bass commenced the instant action on December 29, 2011 against Apple Inc. (Dkt. No. 1.) Apple filed a motion to dismiss on

March 2, 2012. (Dkt. No. 14.) Judge Ware consolidated this action with another case, thereby mooting the motion to dismiss and re-naming the action "*In re Apple iPhone Antitrust Litigation*" (hereafter, "*Apple II*"). (Dkt. No. 25.)

A Consolidated Class Action Complaint in *Apple II* was filed on March 21, 2012 ("Prior *Apple II* Complaint"). (Dkt. No. 26.) There, Plaintiffs alleged that Apple entered into a secret five-year contract with *non-party AT&T Mobility, LLC* ("ATTM") that established ATTM as the exclusive provider of cell phone voice and data services for iPhones through 2012. (*Id.* ¶ 2 (effect of undisclosed agreement was to lock iPhone users into ATTM services for five years).) Apple allegedly programmed and installed software locks on iPhones to prevent purchasers from switching to other competing carriers. (*Id.* ¶ 3.) Apple also "enabled the creation of numerous software programs called 'applications'" and released a software development kit in March 2008 that enabled independent software developers to design applications for use on the iPhone. (*Id.* ¶¶ 4–5.) For an annual $99 fee, the kit allowed developers to submit applications to be distributed "through Apple's applications market, the 'iTunes App Store.'" (*Id.* ¶ 5.) Certain applications were made available for free in the App Store, but for any application purchased, Apple allegedly "collect[ed] 30% of the sale of each application, with the developer receiving the remaining 70%." (*Id.*) Plaintiffs allege Apple refused to approve developers who either did not agree to pay the annual fee or agree to the "apportionment scheme." (*Id.*) Apple also "unlawfully discouraged iPhone customers from downloading competing applications software . . . by

telling customers that Apple would void and refuse to honor the iPhone warranty of any customer who downloaded Third Party Apps." (*Id.*) Consumers "were not provided a means by which they could download Third Party Apps that were not approved by Apple for sale on the App Store." (*Id.* ¶ 6.)

In the Prior *Apple II* Complaint, Plaintiffs alleged three violations of Section 2 by Apple based on two aftermarkets: (1) unlawful monopolization of the applications aftermarket; (2) attempted monopolization of the applications aftermarket; and (3) conspiracy to monopolize the voice and data services aftermarket. Apple moved to dismiss the then-operative complaint and to compel arbitration of claims. (Dkt. Nos. 37 & 48.) In the motion to dismiss, Apple sought dismissal under Fed. R. Civ. P. 12(b)(7) on the grounds that (i) the complaint failed to name ATTM as a defendant, and (ii) ATTM was a necessary and indispensable party pursuant to Fed. R. Civ. P. 19.

On July 11, 2012, Judge Ware issued an Order Denying Without Prejudice Defendant's Motion to Compel Arbitration; Granting in Part Defendant's Motion to Dismiss. (Dkt. No. 75.) The court held that ATTM was a necessary party and that in order to evaluate the alleged conspiracy to monopolize the iPhone voice and data services aftermarket, it must evaluate whether "ATTM unlawfully achieved market power in that Aftermarket due to the conspiracy and thereby foreclosed other companies from entering the market." (*Id.* at 13 (citing Prior *Apple II* Complaint ¶ 98).) "Such an evaluation of ATTM's conduct would necessarily implicate the interests of ATTM, which means that ATTM is a necessary party pursuant to Rule 19(a)." (Dkt. No.

75 at 13.) The court also held that it was feasible for ATTM to be joined "as this is a proper venue, [it] is subject to the Court's personal jurisdiction, and joinder would not destroy the Court's subject matter jurisdiction." (*Id.* at 15.) As such, the court ordered that ATTM be made a party to the action, but noted that Plaintiffs were *not required* to maintain their claims based on the voice and data services aftermarket. (*Id.* at 16 n.29.) Rather, *if* Plaintiffs sought to maintain the claim, the court explicitly ordered that ATTM be added as a party. (*Id.*)

2. Operative Complaint

Plaintiffs filed an Amended Consolidated Class Action Complaint on September 28, 2012 ("*Apple II* Amended Complaint"). (Dkt. No. 81.) Plaintiffs "decline[d] to add ATTM as a party, [and] thereby recognize[d] that the conspiracy to monopolize claim . . . will remain dismissed." (*Id.* ¶ 8 (stating that the claim "has been retained in this amended complaint solely and exclusively to preserve the right of Plaintiffs . . . to challenge the claim's dismissal on appeal"); *see id.* at p. 20.)[4]

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[4] Zack Ward and Thomas Buchar initiated a third action against Apple, Case No. 12-05404 (hereafter, "*Apple III*") on October 19, 2012. Plaintiffs alleged a violation of Section 2 of the Sherman Act for conspiracy to monopolize the iPhone voice and data services aftermarket. In other words, the sole claim in *Apple III* was the conspiracy claim that Judge Ware previously dismissed in *Apple II*, upon which Plaintiffs elected not to proceed. This Court related *Apple II* and *Apple III*. By stipulation of the parties, this Court dismissed *Apple III* with prejudice for the reasons set forth in Judge Ware's Order in *Apple II* dated July 11, 2012, and entered judgment in favor of Apple. (Dkt. Nos. 23 & 26.) An appeal of the dismissal and

The remaining Section 2 claims in *Apple II* are based on the aftermarket "for software applications that can be downloaded on the iPhone for managing such functions as ringtones, instant messaging, photographic capability and Internet applications (the 'Applications Aftermarket')." (*Apple II* Amended Complaint ¶ 86.) Plaintiffs allege the Applications Aftermarket "came into existence immediately upon the sale of the first iPhones because: (a) [it] is derivative of the iPhone market; and (b) no Plaintiff or member of the Class agreed to any restrictions on their access to the Applications Aftermarket. (*Id.* ¶ 88; *id.* ¶ 9 (Apple "failed to obtain iPhone consumers' contractual consent to Apple prohibiting iPhone owners from downloading Third Party Apps").) Plaintiffs assert their claims on behalf of a class of: "[a]ll persons, exclusive of Apple and its employees, who purchased an iPhone anywhere in the United States at any time, and who then also purchased applications from Apple from December 29, 2007 through the present." (*Id.* ¶ 74.)

Plaintiffs further allege:

> 4. Under its Exclusivity Agreement with ATTM, Apple retained exclusive control over the design, features and operating software for the iPhone. To enhance its iPhone-related revenues, Apple enabled the creation of numerous software programs called "applications," such as ringtones, instant messaging, Internet access, gaming, entertainment, video and photography

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judgment in *Apple III* is currently pending before the Ninth Circuit Court of Appeals.

enabling software that can be downloaded and used by iPhone owners.

5. In March 2008, Apple released a "software development kit" ("SDK") for the stated purpose of enabling independent software developers to design applications for use on the iPhone. For an annual fee of $99, the SDK allows developers to submit applications to be distributed through Apple's applications market, the "iTunes App Store." If the application is not made available for free in the App Store, Apple collects 30% of the sale of each application, with the developer receiving the remaining 70%. On information and belief, throughout the Class Period, Apple refused to "approve" any application by a developer who did not pay the annual fee or agree to Apple's apportionment scheme. Apple also unlawfully discouraged iPhone customers from downloading competing applications software (hereafter "Third Party Apps") by telling customers that Apple would void and refuse to honor the iPhone warranty of any customer who downloaded Third Party Apps.

6. iPhone consumers were not provided a means by which they could download Third Party Apps that were not approved by Apple for sale on the App Store.

7. Through these actions, Apple has unlawfully stifled competition, reduced output and consumer choice, and *artificially increased prices* in the aftermarket[] for . . . iPhone software applications.

(*Apple II* Amended Complaint ¶¶ 4–7 (emphasis supplied).)

Plaintiffs allege that by monopolizing or attempting to monopolize the software applications aftermarket for iPhones, it has "harmed competition and injured consumers by reducing output and *increasing prices for those applications*." (*Id.* ¶ 11 (emphasis supplied).) Apple has, by design, programmed the iPhone such that iPhone purchasers are "prevented . . . from downloading any Third Party Apps offered by software manufacturers who did not share their revenues with Apple or pay a fee to Apple to sell through iTunes." (*Id.* ¶ 50.) Third Party Apps appeared immediately after the iPhone 2G was launched and "generated competition for Apple in the applications aftermarket." (*Id.* ¶ 67.) Further, Apple faced "competition for iPhone ringtones. When a customer purchased a song for $1 from the Apple iTunes store, Apple charged the customer an additional 99 cents to convert any portion of that song into a ringtone." (*Id.* ¶ 68.) On the other hand, competing programmers sought to offer a variety of ringtone programs offering free downloads. (*Id.*) Apple initially sought to eliminate Third Party Apps, but "programmers of Third Party Apps quickly circumvented Apple's locking codes." (*Id.* ¶¶ 51 & 69 (Apple sought to update iTunes software to block third-party ringtone programs).) "The availability of Third Party Apps for iPhones reduced Apple's share of the iPhone aftermarket for ringtones and other applications and greatly reduced or threatened to reduce Apple's expected supracompetitive revenues and profits in that aftermarket." (*Id.* ¶ 70.) Put another way, Plaintiffs allege that Apple's anticompetitive actions have

"reduced output and competition and resulted in *increased prices for products sold in the iPhone Applications Aftermarket* and, thus, harms competition generally in that market." (*Id.* ¶¶ 91 & 97 (emphasis supplied).)

II. Pending Motion to Dismiss and Motion to Strike

Federal Rules of Civil Procedure 12(b)(1), 12(b)(6), and 12(f) are raised in this Motion. Although there is no mandatory "sequencing of jurisdictional issues," jurisdictional questions ordinarily must precede merits determinations in dispositional order. *Sinochem Int'l. Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) (citing *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999)). The Court therefore proceeds first with its jurisdictional analysis of the pending Motion under Rule 12(b)(1), and will then proceed with Plaintiffs' failure to add ATTM as a party despite Judge Ware's July 11, 2012 order, the Motion to Strike under Rule 12(f), and finally the Rule 12(b)(6) portion of the Motion to Dismiss.

A. Motion to Dismiss for Lack of Subject Matter Jurisdiction

1. Standard Under Federal Rule of Civil Procedure 12(b)(1)

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) tests the subject matter jurisdiction of the Court. *See, e.g., Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039–40 (9th Cir. 2003), *cert. denied*, 541 U.S. 1009 (2004). When subject matter jurisdiction is challenged, the burden of proof is placed on the party asserting that

jurisdiction exists. *Scott v. Breeland*, 792 F.2d 925, 927 (9th Cir.1986) (holding that "the party seeking to invoke the court's jurisdiction bears the burden of establishing that jurisdiction exists"). Accordingly, the court will presume lack of subject matter jurisdiction until the plaintiff proves otherwise in response to the motion to dismiss. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 376–78 (1994).

Motions under Rule 12(b)(1) may be either "facial" or "factual." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) (citing *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000)). In a facial attack, the movant argues that the allegations of a complaint are insufficient to establish federal jurisdiction. *Id.* By contrast, a factual attack or "speaking motion" disputes the allegations that would otherwise invoke federal jurisdiction. *Id.* In resolving a factual attack, district courts may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment. *Id.* (citing *Savage*, 343 F.3d at 1039 n.2). Courts consequently need not presume the truthfulness of a plaintiff's allegations in such instances. *Id.* (citing *White*, 227 F.3d at 1242). Indeed, "[o]nce the moving party has converted a motion to dismiss into a factual motion by presenting affidavits or other evidence properly before the court, the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction." *Id.* (quoting *Savage*, 343 F.3d at 1039 n.2). Further, the existence of disputed material facts will not preclude a trial court from evaluating for itself the merits of jurisdictional claims, except

where the jurisdictional and substantive issues are so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to the merits. *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983) (citing *Thornhill Publ'g Co. v. Gen. Tel. Corp.*, 594 F.2d 730, 733–35 (9th Cir. 1979)).

Because Apple argues that Plaintiffs' allegations are insufficient to establish standing, the Court treats the pending Motion as a facial attack on subject matter jurisdiction.

2. Article III Standing

Apple challenges Plaintiffs' Article III standing. A plaintiff has Article III standing when: (1) he or she suffers a "concrete and particularized" injury-in-fact; (2) there is a "causal connection between the injury and the conduct complained of"; and (3) the injury will likely be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992); *Wedges/Ledges of California, Inc. v. City of Phoenix, Arizona*, 24 F.3d 56, 61 (9th Cir. 1994). In class actions, the named plaintiffs must satisfy the requirements of standing. *Lewis v. Casey*, 518 U.S. 343, 357 (1996) ("even named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent") (internal quotations and citations omitted). The absence of any one element deprives a plaintiff of Article III standing and requires dismissal. *See Whitmore v. Fed. Election Comm'n*, 68 F.3d 1212, 1215 (9th Cir. 1995).

Apple argues that Plaintiffs' claims must be dismissed because no named Plaintiff alleges he or she ever purchased an App or was overcharged; that any overcharge was the result of allegedly wrongful conduct; nor that named Plaintiffs suffered any injury therefrom. (Mot. at 8.) Apple further argues that Plaintiffs do not allege they were "unaware" of Apple's Apps policies or misled regarding the policies. (*Id.*)

Plaintiffs disagree and specifically emphasize their "collective[]" allegations that they have been deprived lower cost alternatives, paid higher prices for "Apple 'approved' applications," and/or had their iPhones disabled or destroyed. (Opp. at 14; *Apple II* Amended Complaint ¶¶ 92 & 98.) Five of seven named Plaintiffs submit declarations in opposition to the Motion particularizing their allegations of injury. (Opp. at 14.) In sum, these declarations state that named Plaintiffs purchased iPhone applications from the App Store, "would have liked" the ability to download or purchase applications "not available on the App Store," and were not aware at the time of the iPhone purchase that they would be limited to App Store applications nor that "Apple would charge . . . a fee for purchasing applications equivalent to 30% of the purchase price." (*See* Declaration of Michael Liskow in Support of Plaintiffs' Opposition to Defendant Apple's Motion to Dismiss Plaintiffs' Amended Complaint ["Liskow Decl." (Dkt. No. 100)] at Exs. A–E, attaching declarations.) Each declaration concludes with a statement (or substantively similar statement) that "[i]f the 30% fee is proven to be an antitrust violation, or if my inability to obtain apps from sources other than the App Store is proven to be an antitrust violation, I

believe that I have been injured by such violations because I was then overcharged for my apps and prevented from buying apps I wanted to download." (*Id.*; *see also id.*, Ex. D ("I was deprived of certain apps and could have been overcharged").)

The Court finds that Plaintiffs' allegations in the Amended Complaint are insufficient to establish Article III standing. Notably, the Amended Complaint contains allegations that each named Plaintiff purchased an iPhone and "paid for AT&TM *voice and data service* for [his/her] iPhone at AT&TM's stated rates during the Class [P]eriod." (*Apple II* Amended Complaint ¶¶ 3–19 (emphasis supplied); *id.* ¶ 29 ("Each Plaintiff purchased one or more iPhones . . . [and] also purchased wireless *voice and data services* from AT&TM for their iPhones.") (emphasis supplied); *id.* ¶¶ 30–32 (alleging Apple failed to disclose information prior to the purchase of voice and data services).) The Amended Complaint also alleges that four of the seven named Plaintiffs either "wanted to have the option of switching" to another voice and data service provider and/or "would like the ability to unlock his SIM card for international travel." (*Id.* ¶¶ 33–36.) None of these allegations speak to named Plaintiffs' standing with respect to the *applications aftermarket* claims.

Plaintiffs do not satisfy Article III standing with collective allegations that they have been deprived of lower cost alternatives, paid higher prices for Apple-approved applications, *and/or* had their iPhones disabled or destroyed. (*Id.* ¶¶ 92 & 98.)[5] At a

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[5] Moreover, based on Plaintiffs' allegations, named Plaintiffs do not allege facts showing they satisfy the requirements of the class they purport to represent—*i.e.*, "persons . . . who

minimum, Plaintiffs must allege facts showing that each named Plaintiff has *personally suffered* an injury-in-fact based on Apple's alleged conduct. This requires that Plaintiffs at least purchased applications.

While the Plaintiffs' declarations purport to provide information that may satisfy certain deficiencies, the Court considers those declarations only with respect to whether leave to amend should be granted.[6] In this case, the Court finds that leave

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purchased an iPhone ... and who then also purchased applications from Apple from December 29, 2007 through the present." (*Apple II* Amended Complaint ¶ 74.)

6 As noted above, Apple does not dispute the allegations that would otherwise invoke federal jurisdiction and thus raises a facial challenge to Plaintiffs' claims. *See Safe Air for Everyone*, 373 F.3d at 1039. Plaintiffs cite two district court cases for the proposition that they are "permitted to submit declarations buttressing their standing in response to a Rule 12(b)(1) motion." (Opp. at 14 n.5.) Neither case states a categorical rule that declarations may be considered in a *facial attack* under Fed. R. Civ. P. 12(b)(1). In *Nichols v. Brown*, 859 F. Supp. 2d 1118, 1126 (C.D. Cal. 2012), the court considered a Rule 12(b)(1) facial attack on the complaint for lack of subject matter jurisdiction. The court held that plaintiff lacked Article III standing because the complaint did not allege an injury-in-fact, but rather alleged only a desire to engage in a prohibited activity. *Id.* at 1128. The court referenced plaintiff's declaration to emphasize that—like the complaint—the declaration similarly failed to allege an injury-in-fact. *Id.* at 1128 n.4. In *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 608 F. Supp. 2d 1166, 1184 (N.D. Cal. 2009), the court considered a factual attack on the complaint for lack of subject matter jurisdiction. Notably, a prior order of the court permitted a renewed motion to dismiss "after an appropriate amount of discovery" had been taken to "fully develop" arguments. *Id.* at 1175. Because the "speaking motion" was based on facts in the record, the court considered the factual

to amend is appropriate because additional facts could be alleged to satisfy Plaintiffs' Article III standing requirements. *See Lujan*, 504 U.S. at 560–61 (Article III standing satisfied where plaintiff suffers a "concrete and particularized" injury-in-fact, there is a "causal connection between the injury and the conduct complained of" and the injury will likely be redressed by a favorable decision). However, the Court notes that Plaintiffs' allegations showing injury-in-fact should not be conclusory in nature. (*See* Liskow Decl., Exs. A–E ¶ 8 ("[i]f the 30% fee is proven to be an antitrust violation, . . . I believe that I have been injured by such violations because I was then overcharged for my apps and prevented from buying apps I wanted to download" or "I was deprived of certain apps and could have been overcharged").)

For the foregoing reasons, the Court GRANTS Defendant's Motion based on a lack of Article III standing WITH LEAVE TO AMEND. The Court requests that if Plaintiffs amend their complaint, the document be captioned to reflect that it is a "second amended" complaint.

B. Plaintiffs' Failure to Add ATTM as a Party on the Voice and Data Claim

Apple seeks dismissal of the voice and data aftermarket claim for failure to add ATTM as a party, as required by Judge Ware's July 11, 2012 Order. (Mot. at 5.) Plaintiffs concede in the *Apple II* Amended Complaint that the third claim "remain[s] dismissed" and was retained in the complaint "solely

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evidence presented and overruled defendants' objections to exhibits contained in plaintiff's cross declaration. *Id.* at 1211.

and exclusively to preserve" the right of appeal. (*Apple II* Amended Complaint ¶ 8 & p. 20.) In light of these allegations and the fact that the dismissal of this claim is now on appeal in *Apple III* following a stipulated judgment by the parties, the third claim in this action for Conspiracy to Monopolize the iPhone Voice and Data Services Aftermarket is hereby **DISMISSED WITH PREJUDICE.**

C. Motion to Strike

1. Standard Under Federal Rule of Civil Procedure 12(f)

Fed. R. Civ. P. 12(f) provides that the court "may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." "The function of a [Rule] 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial[.]" *Whittlestone Inc. v. Handi-Craft Co.*, 618 F.3d 970, 973 (9th Cir. 2010) (citing *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993)). Motions to strike are generally disfavored (*Colaprico v. Sun Microsystem, Inc.*, 758 F. Supp. 1335, 1339 (N.D. Cal. 1991)) and are not granted unless it is clear that the matter sought to be stricken could have no possible bearing on the subject matter of the litigation (*LeDuc v. Kentucky Cent. Life Ins. Co.*, 814 F. Supp. 820, 830 (N.D. Cal. 1992)). Consequently, when a court considers a motion to strike, it "must view the pleading in a light most favorable to the pleading party." *In re 2TheMart.com, Inc. Sec Lit.*, 114 F. Supp. 2d 955, 965 (C.D. Cal. 2010). In deciding whether to grant a motion to strike under Rule 12(f), the court must

start with the rule's plain language and determine whether the matter at issue is: (1) an insufficient defense; (2) redundant; (3) immaterial; (4) impertinent; or (5) scandalous. *Id.* at 973–74.

2. Summary of Arguments

Apple moves to strike "all allegations concerning, and requests for injunction based on, the voice and data claim," which Plaintiffs effectively dismissed by not adding ATTM as a party per Judge Ware's July 11, 2012 Order. Apple contends these allegations are immaterial, impertinent, and improper. (Mot. at 6.)

Plaintiffs argue that Apple has not shown the allegations regarding the voice and data services and that aftermarket are scandalous, impertinent, or immaterial, nor is there any prejudice in the repleading of that claim such that Plaintiffs preserve the claim for appeal. (Opp. at 2.)

3. Analysis

The Court agrees with Apple that Plaintiffs' allegations regarding a dismissed claim are, at a minimum, immaterial and impertinent. Plaintiffs elected not to proceed with their voice and data services aftermarket claim, yet a significant portion of their allegations are still directed to ATTM's voice and data services. (*See, e.g.*, *Apple II* Amended Complaint ¶¶ 2 (undisclosed five-year agreement between Apple and ATTM "locked iPhone users" into five years of service), 3 (Apple installed software locks and prevented purchasers from switching carriers), 9 (consumers did not consent to: using ATTM as data and service provider for five years; having phones locked such that SIM cards of other

providers would not work; not having access to unlock codes), 13–19 (named Plaintiffs each purchased iPhone and paid ATTM for voice and data services), 25–49 & 52–55 (focusing on locking of phones with respect to voice and data services) & 56–66 (focusing on five-year exclusivity agreement with ATTM).) In addition, Plaintiffs continue to allege a conspiracy with third-party ATTM. (*See, e.g.*, *Apple II* Amended Complaint ¶¶ 55, 63 & 66.)

For these reasons, the Court **GRANTS** Apple's Motion to Strike and **ORDERS** that Plaintiffs not include allegations relating to voice and data services or a conspiracy with ATTM if a second amended complaint is filed.

D. Motion to Dismiss for Failure to State a Claim

1. Standard Under Federal Rule of Civil Procedure 12(b)(6)

Pursuant to Fed. R. Civ. P. 12(b)(6), a complaint may be dismissed against a defendant for failure to state a claim upon which relief may be granted against that defendant. Dismissal may be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990); *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 533–34 (9th Cir. 1984). For purposes of evaluating a motion to dismiss, the court "must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the nonmoving party." *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). Any existing ambiguities must

be resolved in favor of the pleading. *Walling v. Beverly Enters.*, 476 F.2d 393, 396 (9th Cir. 1973).

However, mere conclusions couched in factual allegations are not sufficient to state a cause of action. *Papasan v. Allain*, 478 U.S. 265, 286 (1986); *see also McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988). The complaint must plead "enough facts to state a claim [for] relief that is plausible on its face." *Bell Atlantic. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Thus, "for a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009). Courts may dismiss a case without leave to amend if the plaintiff is unable to cure the defect by amendment. *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000).

2. Request for Judicial Notice

In ruling on a Rule 12(b)(6) motion, generally, a court "may not consider any material beyond the pleadings." *United States v. Corinthian Colleges*, 655 F.3d 984, 998–999 (9th Cir. 2011) (citing *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001)). A court may, however, "consider unattached evidence on which the complaint 'necessarily relies' if: (1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the

document." *Corinthian Colleges*, 655 F.3d at 999 (citing *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006) and *Lee*, 250 F.3d at 688). In addition, Fed. R. Evid. 201 allows a court to take judicial notice of "matters of public record," but not facts that may be subject to a reasonable dispute. *Lee*, 250 F.3d at 689–90; Fed. R. Evid. 201(b)(2) (judicial notice may be taken of facts not subject to a reasonable dispute because they "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned"). Taking judicial notice of "matters of public record" under Fed. R. Evid. 201 and consideration of documents "necessarily relie[d]" upon in the complaint are two separate exceptions to the general rule that a court may not consider material beyond the pleadings on a Rule 12(b)(6) motion. *Lee*, 250 F.3d at 689–90.

As part of its Motion, Apple seeks judicial notice of two press releases referenced in, but not attached to, the operative complaint. (Defendant Apple's Request for Judicial Notice in Support of Its Motion to Dismiss Plaintiffs' Amended Consolidated Complaint ("RJN" [Dkt. No. 89]), Exs. 1 & 2; *see Apple II* Amended Complaint ¶¶ 5 & 76.) These press releases—entitled "Apple Announces iPhone 2.0 Software Beta" (dated March 6, 2008) and "Apple's App Store Downloads Top 25 Billion" (dated March 5, 2012)—are available online. Apple contends judicial notice is proper because the documents are necessarily relied on in the complaint and Plaintiffs purport to summarize the contents of the press releases therein. (RJN at 1–3.)

Plaintiffs did not file an opposition or objection to the request for judicial notice, nor did they object at the hearing to the RJN itself or defense counsel's

statements based on the contents of the exhibits at issue.

While Plaintiffs have not disputed the authenticity of the exhibits, the Court finds it is not appropriate to take judicial notice in this instance. The fact of the issuance of press releases may be undisputed, but the contents therein may nonetheless be subject to a reasonable dispute. For these reasons, the Court **DENIES** Apple's Request for Judicial Notice.

3. Antitrust Standing

a. *Illinois Brick* Doctrine

In *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), the Supreme Court held that "only direct purchasers have standing under section 4 of the Clayton Act[7] to seek damages for antitrust violations." *Delaware Valley*, 523 F.3d at 1120–21 (citing *Illinois Brick*, 431 U.S. at 735). Under *Illinois Brick*, "only the first party in the chain of distribution to purchase a price-fixed product has standing to sue." *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 911 F. Supp. 2d 857, 864 (N.D. Cal. 2012) ("*In re CRT*"); *In re ATM Fee Antitrust Litig.*, 686 F.3d 741, 748 (9th Cir. 2012) ("[A] direct

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[7] Section 4 of the Clayton Act, 15 U.S.C. section 15(a) ("Section 4"), provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." "The Supreme Court has interpreted th[is] section narrowly, thereby constraining the class of parties that have statutory standing to recover damages through antitrust suits." *Delaware Valley Surgical Supply Inc. v. Johnson & Johnson*, 523 F.3d 1116, 1120 (9th Cir. 2008).

purchaser has 'been injured in its business as required by [§] 4' even though it passes on 'claimed illegal overcharge[s] to' its customers.") (first alteration supplied) (quoting *Illinois Brick*, 431 U.S. at 724). Indirect purchasers are precluded from suing "based on unlawful overcharges passed on to them by intermediaries in the distribution chain who purchased directly from the alleged antitrust violator." *In re CRT*, 911 F. Supp. 2d at 864 (citations omitted). While *Illinois Brick* prevented offensive use of a "pass-through" theory by indirect purchasers, it also prohibited defendants from using a pass-on theory to challenge the standing of direct purchasers. *In re CRT*, 911 F. Supp. 2d at 864; *In re ATM Fee*, 686 F.3d at 748.

Standing does not depend solely on a purchaser's status as direct or indirect. Instead, standing of indirect purchasers depends upon whether any of the recognized exceptions to the *Illinois Brick* rule apply. *In re CRT*, 911 F. Supp. 2d at 865. In *In re ATM Fee*, the Ninth Circuit explained there are three exceptions to the rule that indirect purchasers do not have standing: (1) "when a preexisting cost-plus contract with the direct purchaser exists"; (2) where an indirect purchaser "establishes a price-fixing conspiracy between the manufacturer and the middleman" and the conspiracy "fix[es] the price paid by the plaintiffs"—known as the "co-conspirator exception"; and (3) "when customers of the direct purchaser own or control the direct purchaser" or "when a conspiring seller owns or controls the direct

purchaser." *In re ATM Fee*, 686 F.3d at 749 (citations omitted).[8]

b. Summary of Arguments Regarding Antitrust Standing

Apple argues that Plaintiffs' Amended Complaint impermissibly seeks damages for injuries sustained by Plaintiffs as indirect purchasers, in violation of *Illinois Brick*. Plaintiffs are "indirect victims of Apple's policies" because *the developers* are alleged to pay Apple a $99 annual developer fee and 30% of each paid application. (Mot. at 9.) Plaintiffs do not allege that their injury includes payment of the $99 annual fee. Rather, their injury consists of "(a) be[ing] deprived of lower cost alternatives for applications; (b) be[ing] forced to pay higher prices for Apple 'approved' applications; and/or (c) ha[ving] their iPhones disabled or destroyed." (*Apple II* Amended Complaint ¶¶ 92 & 98.)

Apple relies heavily on *In re ATM Fee*, where ATM cardholders challenged certain fees associated with use of ATMs not owned by their card-issuing bank, or a "foreign" ATM. (Mot. at 9–10.) *In re ATM Fee*, 686 F.3d at 744–45. While cardholders paid certain fees for using a foreign ATM, at least one other fee was paid by the card-issuing bank to the ATM owner (an "interchange fee"). *Id.* at 745. Plaintiffs alleged that defendants engaged in horizontal price fixing by colluding to fix this

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[8] The Ninth Circuit also recognized a potential fourth exception that "indirect purchasers can sue for damages if there is no realistic possibility that the direct purchaser will sue." *In re ATM Fee*, 686 F.3d at 749 (noting, however, a lack of clarity regarding whether the exception exists).

"interchange fee," which was then passed on to plaintiffs as part of the foreign ATM fee paid by cardholders to the card-issuing bank. *Id.* at 746. The district court held that the allegedly unlawful (interchange) fee was not directly paid by cardholder-plaintiffs, and thus they were indirect purchasers. *Id.* at 750. The Ninth Circuit affirmed that plaintiff-cardholders were indirect purchasers and thus lacked standing under *Illinois Brick*. *Id.* at 750.

Notably, the Ninth Circuit also agreed with the district court that the co-conspirator exception to *Illinois Brick* did not provide a basis for standing. That exception allows an indirect purchaser to sue when the direct purchaser conspires horizontally or vertically to fix the price paid by plaintiffs. *Id.* In contrast, the ATM cardholders alleged that defendants fixed the interchange fee that was paid between members of the ATM network and *then* passed along the artificially inflated fee to plaintiffs. *Id.* at 750–51.[9] In the Ninth Circuit, however, "the price paid by a plaintiff must be *set by the conspiracy* and not merely affected by the setting of another price." *Id.* at 754 (emphasis supplied). Because it was not the case that defendants conspired to fix the

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[9] The Ninth Circuit rejected plaintiffs' argument that "conspiring to set a price for the purpose and effect of raising the price at issue equates to fixing that price and makes the payers of the raised price direct purchasers." *In re ATM Fee*, 686 F.3d at 753; *id.* at 755 (declining to extend co-conspirator exception beyond when the conspiracy involves setting the price paid by the plaintiffs).

actual price plaintiffs paid, the exception did not apply.[10]

Apple argues that here there are no allegations that an actual price was fixed. All the allegedly wrongful conduct is ancillary as it restricts developers only: the developer sets the price of the Apps in accordance with Apple's policies, the developer agrees to pay Apple 30% of the price of any downloaded Apps, and the developer pays the $99 developer fee. (Mot. at 10.) Thus, as was the case in

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[10] Apple also relies on *Campos v. Ticketmaster Corp.*, 140 F.3d 1166, 1169 (8th Cir. 1998) for the proposition that indirect victims of exclusionary conduct are indirect purchasers who "bear[] some portion of a monopoly overcharge only by virtue of an antecedent transaction between the monopolist and another, independent purchaser." In *Campos*, plaintiffs were music fans who sued Ticketmaster for, among other things, engaging in price fixing with concert venues and promoters and monopolizing (and attempting to monopolize) the market for ticket distribution servicers. *Id.* at 1168. The district court dismissed the action, holding that plaintiffs lacked standing under *Illinois Brick*, which the Eighth Circuit affirmed. *Id.* at 1171–72. There, plaintiffs argued they were direct purchasers of "ticket distribution services" because they paid directly to Ticketmaster service *and* convenience fees. *Id.* at 1171 (Eighth Circuit noted that "like the Third Circuit, [it] d[id] not find billing practices to be determinative of indirect purchaser status."). The appellate court noted that Ticketmaster had exclusive contracts with concert promoters that required venues to use Ticketmaster for ticket distribution to those events; thus, plaintiffs' alleged inability to obtain ticket delivery services in a competitive market was the consequence of the "antecedent inability of venues to do so." *Id.* ("[T]icket buyers only buy Ticketmaster's services because concert venues have been required to buy those services first."). This "derivative dealing" was the "essence of indirect purchaser status" which, accordingly, constituted a bar to the antitrust claims for damages. *Id.*

Campos, the alleged unlawful increase in price is caused by the antecedent transaction between Apple and the developers. (*Id.* at 11.) The consumer's involvement is therefore derivative of the antecedent transaction and, consequently, they are indirect purchasers without antitrust standing.

Plaintiffs disagree. Plaintiffs contend under *In re ATM Fee*, direct purchaser status is determined by "whether the plaintiff paid the alleged unlawful fee directly to the alleged wrongdoer." (Opp. at 12 (emphasis omitted).) Here, Plaintiffs allege they were "forced to buy third party developers' applications *directly from Apple's App Store*, and that iPhone consumers were forced *to pay Apple* a 30% fee on top of the cost for the apps." (Opp. at 11 (citing *Apple II* Amended Complaint ¶¶ 4–5) (emphasis added in Opposition).) As such, "they are direct purchasers and have standing to sue under Ninth Circuit jurisprudence." (*Id.* at 12 (citing *In re ATM Fee*, 686 F.3d at 754).)[11]

Plaintiffs emphasize that Apple ignores an entire category of apps alleged in the *Apple II* Amended Complaint. Specifically, Plaintiffs are direct purchasers because they brought both (i) Apple-made Apps directly from Apple, and (ii) third-party developer Apps directly from Apple's App Store. (Opp. at 11; *see Apple II* Amended Complaint ¶¶ 67–

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[11] Plaintiffs acknowledge in their Opposition that they do not challenge the $99 annual fee paid by developers to Apple. (Opp. at 12–13 (conceding Plaintiffs did not pay that fee themselves).) "Plaintiffs challenge *only the 30% fee* that they paid directly to Apple." (Opp. at 13 (emphasis supplied).)

70.)[12] An example of such Apple-made apps were "songs converted into ringtones, for which 'Apple charged the customer an additional 99 cents." (Opp. at 11; *Apple II* Amended Complaint ¶ 68 ("Apple also faced competition for iPhone ringtones. When a customer purchased a song for $1 from the Apple iTunes store, Apple charged the customer an additional 99 cents to convert any portion of that song into a ringtone.") "In both cases [of Apple-made apps and third party apps], consumers paid the supracompetitive price *directly to the monopolist* – Apple – which kept the entirety of the overcharges for itself." (Opp. at 11–12.)[13] In addition, Plaintiffs note that Apple attempts to convolute the allegations to make it appear as though the app developers are the direct purchasers. (Opp. at 12.) This is not the case: Apple cannot be a direct purchaser because it does not buy the apps, but iPhone consumers buy the apps directly from Apple because they are not otherwise available to purchase on an iPhone.

In its Reply, Apple contends Plaintiffs' argument that iPhone consumers were forced to pay Apple a 30% fee *on top of* the cost of the app is not reflected

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[12] The Court notes that throughout the Opposition, Plaintiffs appear to cite to paragraph numbers from a prior complaint, and not the operative Amended Complaint.

[13] Plaintiffs argue that the Eighth Circuit's holding in *Campos v. Ticketmaster*—that plaintiffs were indirect purchasers even though they dealt directly with the alleged monopolist—is inconsistent with Ninth Circuit precedent. (Opp. at 13.) In fact, Judge Ware in *Apple I* noted in his order granting in part plaintiffs' motion for class certification that "the Court is not aware of any Ninth Circuit case that applied *Illinois Brick* in this manner." (*Apple I*, Dkt. No. 466 at 19 n.27.)

in the operative complaint, which only states that for each paid app made available in the app store, "Apple collects 30% of the sale of each application, with the developer receiving the remaining 70%." (*Apple II* Amended Complaint ¶ 5; Reply at 8.) In other words, Apple does not charge consumers a 30% fee on top of the cost of the app, but Apple charges the developers a 30% fee for the apps they choose to offer for a cost in the App Store. (Reply at 8.) Apple argues this is identical to *In re ATM Fee* because this 30/70% "apportionment scheme" leads developers to pass on the 30% fee to consumers by charging higher prices for their Apps, similar to how the "interchange fee" in *In re ATM Fee* was allegedly passed on to cardholders as a "foreign ATM fee" that they directly paid. (*Id.* at 9.)

c. Analysis

An analysis under *Illinois Brick* centers on whether the alleged unlawful fee was paid directly or through a pass-through. The burden is on Plaintiffs to allege the theory and facts upon which they are proceeding. The allegations in the Amended Complaint contradict the arguments made in opposition to Apple's Motion. The *Apple II* Amended Complaint does not allege a "supracompetitive" or "fixed" price, but rather a mark-up. Plaintiffs allege throughout the Amended Complaint that Apple's conduct has "unlawfully stifled competition, reduced output and consumer choice, and artificially increased prices in the aftermarkets for . . . iPhone software applications." (*Apple II* Amended Complaint ¶ 7; *id.* ¶¶ 11 ("increased price for those applications"), 91 & 97.) Nowhere do Plaintiffs explain how Apple's conduct results in increased

"prices" or how said prices were paid. In their Opposition, Plaintiffs confirm that they challenge "only the 30% fee" (Opp. at 13) but also, for the first time, argue that "iPhone consumers were forced *to pay Apple* a 30% fee on top of the cost for the apps" (Opp. at 11 (emphasis in original)).[14] Because the Court's analysis focuses on the actual allegations of the Amended Complaint, and those allegations do not sufficiently identify the basis upon which Plaintiffs are proceeding, the Court declines to issue an advisory opinion analyzing *Illinois Brick* as relevant here.

Accordingly, the Court GRANTS leave to amend the complaint to address antitrust standing and *Illinois Brick*.

4. Other Arguments Regarding Failure to State a Claim

In light of the Court's dismissal based on a lack of Article III standing, the Court declines to address additional arguments raised by Apple. To the extent that Plaintiffs file a second amended complaint, Apple *may not raise* for the first time on a future motion to dismiss any argument that was *previously available but not raised* in this Motion.

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[14] On this point, Plaintiffs cite to the complaint at paragraphs 4–5. The Court notes, however, that the only reference to a 30% fee in this paragraph range does not provide that the fee is paid "on top of" the cost of the application. Rather, it states: "Apple collects 30% of the sale of each application, with the developer receiving the remaining 70%." (*Apple II* Amended Complaint ¶ 5.)

III. Effect Of Prior Orders

A. Effect of Federal Rule of Civil Procedure 12(g) on Pending Motion to Dismiss

Plaintiffs argue that Apple's Motion is improper under Fed. R. Civ. P. 12(g)(2), which provides that "[e]xcept as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion." Rule 12(h)(2) states that failure to state a claim upon which relief can be granted, to join a person under Rule 19(b), or to state a legal defense to a claim may be raised: (A) in any pleading allowed or ordered under Rule 7(a); (B) by a motion under Rule 12(c); or (C) at trial. Rule 12(h)(3) provides that "[i]f the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."[15]

Plaintiffs contend that Apple is barred from asserting lack of standing and failure to state a claim because it failed to raise these arguments on either of the two prior motions to dismiss. (Opp. at 7–9 (arguing that claims based on applications

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[15] The Advisory Committee Notes to Fed. R. Civ. P. 12 explain the policy behind the prohibition against successive motions: "This required consolidation of defenses and objections in a Rule 12 motion is salutary in that it works against piecemeal consideration of a case." In addition, "[a] party who by motion invites the court to pass upon a threshold defense should bring forward all the specified defenses he then has and thus allow the court to do a reasonably complete job. The waiver reinforces the policy of subdivision (g) forbidding successive motions."

aftermarket are the "exact same" as the Prior *Apple II* Complaint and Apple was "fully capable" of raising its arguments earlier).)[16]

Apple responds that it is not barred by Rule 12(g) because the defense of failure to state a claim and challenges to subject matter jurisdiction are never waived, and may be asserted at any time before trial. (Reply at 3–4.)

Apple is correct that its defenses of failure to state a claim and lack of subject matter jurisdiction were not waived if not included in its first Rule 12 motion. Such defenses may be raised by a Rule 12(c) motion or at trial. However, Apple is incorrect to the extent that it implies it may repeatedly make Rule 12(b) motions to assert such defenses. (*See* Reply at 4.) While specific defenses may not have been waived, Apple does not enjoy an unbridled ability to file successive motions to dismiss. Successive motions under Rule 12(b) are generally not permissible and create significant inefficiencies within the court system.

District courts in the Ninth Circuit have noted, however, that Rule 12(g) applies to situations where

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[16] Apple's first motion to dismiss in *Apple II* sought dismissal for failure to join an indispensable party. Judge Ware denied the motion as moot when he ordered that Plaintiffs file a consolidated complaint. Apple's second motion to dismiss re-raised the failure to join an indispensable party under Rule 12(b)(7), and sought dismissal of the voice and data services aftermarket claim under Rule 12(b)(6) for failure to state a claim for conspiracy or to allege a cognizable aftermarket. Judge Ware granted the motion for failure to join ATTM as a necessary party under Rule 12(b)(7) and denied the Rule 12(b)(6) motion as premature without prejudice to renew on a different ground after joining ATTM.

successive motions are filed for "sole purpose of delay." *Kilopass Tech. Inc. v. Sidense Corp.*, No. C 10-02066 SI, 2010 WL 5141843, at *3 (N.D. Cal. Dec. 13, 2010) (citing *Abarca v. Franklin County Water Dist.*, No. 1:07–CV–0388, 2009 WL 1393508, at *2 (E.D. Cal. May 18, 2009)); *see Allstate Ins. Co. v. Countrywide Fin. Corp.*, 824 F. Supp. 2d 1164, 1175 (C.D. Cal. 2011) ("Rule 12(g) is designed to avoid repetitive motion practice, delay, and ambush tactics."); *see Davidson v. Countrywide Home Loans, Inc.*, No. 09-CV-2694-IEG JMA, 2011 WL 1157569, at *4 (S.D. Cal. Mar. 29, 2011) (successive motions not brought for purpose of wasting time under Rule 12 where defendants responded to multiple amended complaints). Even if a party files successive motions, a court has discretion to consider the arguments to expedite final disposition on particular issues. *Davidson*, 2011 WL 1157569, at *4; *Allstate Ins.*, 824 F. Supp. 2d at 1175 (noting substantial authority provides that "successive Rule 12(b)(6) motions may be considered where they have not been filed for the purpose of delay, where entertaining the motion would expedite the case, and where the motion would narrow the issues involved").

The Court rejects Plaintiffs' argument that Rule 12(g) bars the consideration of subject matter jurisdiction in the pending Motion. Because the Court is obligated to dismiss an action in the absence of subject matter jurisdiction—whether by its own motion or by motion of a party—consideration of this issue promotes efficiency and expedites disposition of the action on the merits. In addition, the Court notes that because Apple would be permitted to file a Rule 12(c) motion on the grounds raised in this Motion, efficiency is served by addressing the issues

sooner. *See Aldabe v. Aldabe*, 616 F.2d 1089, 1093 (9th Cir. 1980) (motion for judgment on pleadings to raise defense of failure to state claim may be made even after filing answer).

B. Collateral Estoppel

Plaintiffs argue Apple is barred by the doctrine of non-mutual offensive collateral estoppel from raising "the very same arguments it fully and fairly litigated but lost in a prior action." (Opp. at 9.) Collateral estoppel "bars the relitigation of issues actually adjudicated in previous litigation between the same parties." *Clark v. Bear Stearns & Co., Inc.*, 966 F.2d 1318, 1320 (9th Cir.1992). A party asserting collateral estoppel must show: (i) "that the estopped issue is identical to an issue litigated in a previous action"; and (ii) that "the issue to be foreclosed in the second litigation must have been litigated and decided in the first case." *Kamilche Co. v. United States*, 53 F.3d 1059, 1062 (9th Cir. 1995), *opinion amended on reh'g sub nom. Kamilche v. United States*, 75 F.3d 1391 (9th Cir. 1996) (citations omitted).

Plaintiffs argue that because Apple fully raised and lost "each of the central arguments" on this Motion before Judge Ware, it is precluded "from raising any form or variation of them again[,] not just the precise arguments Apple made." (Opp. at 9–10.)[17] Moreover, Plaintiffs contend that Judge

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[17] Specifically, Judge Ware held in *Apple I* that plaintiffs had sufficiently alleged relevant aftermarkets, market power, and monopolization for both the voice and data services and applications aftermarkets to state a claim. (Dkt. No. 144 at 15–19.)

Ware's Order disposing of Apple's arguments was sufficiently "final" for collateral estoppel purposes because it was firm enough to be accorded preclusive effect. (*Id.* at 10–11 (denials of pre-trial motions are "often sufficiently 'final' for collateral estoppel").) Plaintiffs acknowledge that it is within the court's discretion to apply the doctrine of collateral estoppel. (Opp. at 9.)

Apple responds that it is not barred by collateral estoppel because the claims in *Apple II* are not "identical" to *Apple I*. (Reply at 5–6.) Apple identifies the allegations regarding the 30/70% "apportionment scheme" as being a "core" allegation in this action that was not alleged in *Apple I*. (*Id.* (further arguing that the primary allegations have evolved from consumers being unable to download third-party applications to a dispute over the terms of permitting downloads).) In addition, Apple disputes that any ruling by Judge Ware constituted a final judgment with regard to the pending apps claims. (Reply at 7 (ruling was part of an interlocutory order).) Finally, Apple argues that the ruling regarding the apps claims was not essential to any judgment because Judge Ware ultimately ordered the action to arbitration. While "an appeal may be taken from Judge Ware's arbitration order, and/or from the arbitrator's decision if appropriate," no appeal can be taken from Judge Ware's interim order on whether Plaintiffs stated their apps claims. (*Id.* at 7–8.)

The Court agrees with Apple that collateral estoppel does not bar its arguments here. The allegations in the two actions are similar and significantly overlap, but not identical. Further, the Court does not agree with Plaintiffs that Judge

Ware's order on a motion to dismiss is sufficiently final, where the rulings could not have been appealed while the action was pending in this district *and* Judge Ware ultimately ordered the action to arbitration. The Court hereby rejects Plaintiffs' argument that collateral estoppel bars Apple's arguments on this Motion.

IV. CONCLUSION

For the foregoing reasons, Apple's Motion to Dismiss Plaintiffs' Amended Consolidated Complaint is **GRANTED WITH LEAVE TO AMEND** as set forth herein. Plaintiffs' second amended complaint shall be filed within twenty-one (21) days of the date of this Order. A Case Management Conference is scheduled for November 4, 2013 at 2:00 p.m. This Order terminates Dkt. No. 88.

IT IS SO ORDERED.

Dated: August 15, 2013

/s/ Yvonne Gonzalez Rogers

YVONNE GONZALEZ ROGERS
UNITED STATES DISTRICT COURT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

IN RE APPLE IPHONE ANTITRUST LITIGATION	CASE NO. C 11-06714-YGR RELATED CASE NO. C 07-05152-JW **DEFENDANT APPLE'S NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT** Date: November 5, 2013 Time: 2:00 P.M. Place: Courtroom 5, 2nd Floor The Honorable Yvonne Gonzalez Rogers

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IV. PROCEDURAL HISTORY AND STATEMENT OF FACTS

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B. The Factual Allegations In The Second Amended Complaint

* * *

Plaintiffs' SAC makes almost no meaningful changes to the allegations relevant to the *Illinois Brick* issues. Plaintiffs' First Amended Complaint challenged what it called "Apple's apportionment scheme" whereby "[i]f the application is not made available for free in the App Store, Apple collects 30% of the sale of each application, with the developer receiving the remaining 70%." (First Amended Complaint, Dkt. 81 ¶ 5.) Apple's *Illinois Brick* arguments targeted that (close to accurate) description of Apple's policies, in response to which Plaintiffs told the Court that they could allege that "iPhone consumers were forced *to pay Apple* a 30% fee on top of the cost for the apps." (Opp. to Mot. to Dismiss, Dkt. 99 ("Opp.") at 11, italics in original, underscoring added.) The SAC, however, does not allege that consumers pay Apple a 30% fee "on top of the cost for the apps." Plaintiffs do repeatedly allege that consumers pay a fee, which they call "Apple's fee," but they never allege that such a fee is added by Apple "on top of the cost for the apps." Instead, just as in the First Amended Complaint, Plaintiffs acknowledge that "Apple takes its 30% commission off the top and then remits the balance, or 70% of the purchase price, to the developer." (SAC ¶ 41; *see also id.* ¶ 40 (referring to a 30% commission).)

Plaintiffs could never honestly allege that Apple adds a fee—any fee—to the price set by developers for their Apps. The truth of Plaintiffs' original allegation, repeated in SAC ¶ 41, that Apple takes a commission off of *the developer's price*, is evident

every time a consumer buys an App from the App Store.

* * *

V. ARGUMENT

A. The SAC Confirms That Plaintiffs Are Indirect Purchasers And Lack Antitrust Standing Under *Illinois Brick*

* * *

The clear intent of the Order was to give Plaintiffs an opportunity to demonstrate that they were not making a claim based on "mark-up" or pass-through dynamics, but instead based on something Apple did directly to the consumer, *e.g.*, an Apple "fee on top of the cost of the app." The former theory is a non-starter, since the core holding of *Illinois Brick* is that due to the "nearly insuperable difficulty" of trying to determine how much of an upstream price increase may have been passed on downstream, a plaintiff whose claim is based on a "pass-on theory" does not suffer injury within the meaning of Section 4 of the Clayton Act. *Illinois Brick Co.*, 431 U.S. at 725 n.3, 726. The latter theory is deficient as well, as seen in *Campos*. 140 F.3d at 1169-71 (*Illinois Brick* barred claim even though Ticketmaster added fees made possible through upstream monopolization). But the Court understandably did not want to deal with that arguably closer issue if it was not presented.

The Second Amended Complaint does its best to avoid doing what the Order directed, while attempting to give the impression of compliance.

Instead of alleging evidentiary facts about how Apple's App Store works or explaining the pricing mechanics, the SAC tries to talk around the issue by using labels and conclusions that skirt the key point. The most pertinent allegations imply that (a) there is a 30% fee, (b) that fee is Apple's, (c) Apple collects it, and (d) consumers pay it for every App they buy. (*See* SAC ¶¶ 4, 6, 7, 8, 14, 41.) But the allegations studiously avoid a simple declarative sentence that Apple takes a price that has been established by the developer and adds 30% (or anything) to that. The Court was crystal clear that there is an important difference between claiming that the fee Apple charges developers is included in the price of an App and claiming that Apple charges its own fee on top of the developer-set price. (Dkt. 108 at 19 n.14.) In fact, that is the entire point of footnote 14 in the Court's Order. Yet Plaintiffs, knowing perfectly well that it would be frivolous to claim that Apple engages in the latter practice, dance around the issue with statements like Apple "charg[es] consumers an extra 30% for every app" (*see, e.g.*, SAC ¶ 8) that sound responsive to the Court's Order but are just a repackaging of Plaintiffs' argument that the developer's price is burdened by Apple's "commission."

These intentionally vague and conclusory allegations are particularly insufficient given the Court's express direction to Plaintiffs to *explain how the 30% fee is paid by consumers*: as a pass-through from developers, or as an entirely separate charge Apple adds "on top of" the developers' App price when the consumer makes a purchase. (Dkt. 108 at 19-20.) The Court asked for clarity on a simple binary distinction about who *first* bears Apple's fee.

If it is the App developer, then Plaintiffs do not have standing to pursue their claim against Apple—even if the fee is "anticompetitive" and passed-through to the consumer.

* * *

It is enough for this motion to be granted that Plaintiffs failed to include the allegation about added fees that they told the Court they could plead. Yet Plaintiffs also cannot bury their earlier allegations *admitting there is no added fee*. Plaintiffs' First Amended Complaint got the relevant facts basically right, alleging that "[i]f the application is not made available for free in the App Store, Apple collects 30% of the sale of each application, with the developer receiving the remaining 70%." (First Amended Complaint, Dkt. 81 ¶ 5.) That does not now disappear.

* * *

Finally, *this* Complaint still admits the key facts. It states, "Apple takes its 30% commission off the top and then remits the balance, or 70% of the purchase price, to the developer." (SAC ¶ 41.) It also states, "Apple always conditioned its 'approval' of such apps on the third party's agreement to give Apple *a share of the third party's sales proceeds*." (*Id.* ¶ 32, emphasis added.) These allegations make clear that Apple's allegedly wrongful conduct acts in the first instance *on developers*, effectively imposing a distribution cost on them. Most everything else Plaintiffs allege, if true, would likewise only *restrict developers* (*i.e.*, the restriction on developers' ability to use alternative means of distribution). The effects

on consumers are by definition indirect effects. The developer, not Apple, sets the "price" for the App and the developer's ultimate proceeds are net of Apple's commission. It is the antecedent transaction between Apple and the developer that causes the allegedly unlawful increase in the price of Apps. As a result, Plaintiffs do not have antitrust standing.

* * *

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

IN RE APPLE iPHONE ANTITRUST LITIGATION	Lead Case No. C 11-06714-YGR
	PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT APPLE'S MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED CONSOLIDATED COMPLAINT
	DATE: November 5, 2013
	TIME: 2:00 P.M.
	CRTRM: 5, 2nd Floor
	JUDGE: Hon. Yvonne Gonzalez Rogers

* * *

I. INTRODUCTION

* * *

Apple continues to argue that Plaintiffs are indirect purchasers who lack antitrust standing by speciously "cherry-picking" from Plaintiffs'

allegations to make them fit Apple's tired and contrived theory that, under *Campos v. Ticketmaster Corp.*, 140 F.3d 1166 (8th Cir. 1998) (a case Judge Ware held is inapplicable to these iPhone actions), Apple's 30% fee is "passed-on" to Plaintiffs by apps developers rather than imposed by Apple and paid directly by Plaintiffs to Apple. Apple invites the Court to ignore the vast bulk of Plaintiffs' allegations, which show indisputably that Apple ***itself*** sells every app ***directly*** to iPhone consumers, Apple ***itself*** imposes and ***directly*** collects from iPhone consumers every 30% fee it charges, and Apple's 30% fee is a supracompetitive price that exceeds the prices consumers otherwise would pay for apps had Apple not unlawfully monopolized the iPhone apps aftermarket.

* * *

Apple has undeniably succeeded in eliminating retail price competition for iPhone apps. Even the apps developers themselves are forbidden by Apple from selling their own products directly to iPhone consumers. Absent Apple's unlawful exclusion of all competition from the apps aftermarket, iPhone consumers could buy apps from the developers and numerous software retailers without having to pay Apple's 30% fee, and many more apps would be available to consumers in a competitive market than are available today.

* * *

II. THE CURATIVE FACTS ALLEGED IN THE SECOND AMENDED COMPLAINT

* * *

Plaintiffs' SAC satisfies each of the Court's concerns. ***First***, the SAC alleges that Apple's 30% fee that Plaintiffs paid was "on top of" what Plaintiffs would otherwise pay for the apps:

- "Consequently, ***the prices for apps*** available in Apple's App Store ***include the developers' price plus Apple's 30%*** mark-up." ¶ 41 (emphasis added).
- Apple charges "***an extra 30%*** for every app." ¶ 8 (emphasis added).

* * *

IV. LEGAL ARGUMENT

A. Plaintiffs are Direct Purchasers with Antitrust Standing

1. Apple's Argument Ignores the Relevant Pleaded Facts

* * *

Apple's whole argument rests on the ***entirely false*** premise that the SAC "does not allege that consumers pay a 30% fee 'on top of the cost for the apps.'" Apple Mem. at 6, 7. Apple simply ignores Plaintiffs' unequivocal allegation that "the prices for apps available in Apple's App Store ***include the developers' price plus Apple's 30% mark-up***." ¶ 41 (emphasis added). The allegation that iPhone apps buyers pay the developers' price ***plus*** Apple's 30% fee is merely a technical, less colloquial way of saying that iPhone consumers pay Apple's 30% fee "on top of the cost for the apps." Plainly, the two expressions mean precisely the same thing. Thus, contrary to Apple's argument, Plaintiffs have indeed

alleged in "a simple declarative sentence" that Apple's fee is in addition to the developers' price for the apps. *See* Apple Mem. at 7. Apple's indirect purchaser argument, which simply brushes aside this allegation, should fail for this reason alone.

Plaintiffs' allegation that iPhone apps buyers pay the apps developers' price "***plus***" Apple's 30% fee is not even the sole allegation that makes this point. Plaintiffs also make many corroborative allegations, which Apple similarly ignores: Plaintiffs allege that Apple charges "an ***extra*** 30% for every app," ¶ 8 (emphasis added); that ***Apple*** charges the 30% fee, not the apps developers, ¶ 40; that iPhone consumers would "pay less" for apps if they were not unlawfully locked into buying apps only from Apple and paying Apple's 30% fee, ¶ 14; that apps developers have been barred by Apple "from selling apps at prices below Apple's ***inflated 30% marked-up price***," ¶ 50 (emphasis added); that "Apple's 30% fee constitutes virtually pure profit for Apple," ¶ 48; that in "a competitive apps distribution environment," developers would be able to sell their own apps directly to consumers "without charging Apple's 30% mark-up" and software retailers could sell apps "for far less than a 30% profit," ¶ 48; and that the absence of competition has caused iPhone consumers to pay "hundreds of millions of dollars ***more*** for iPhone apps than they would have paid in a competitive market," ¶ 4 (emphasis added).

Taken collectively, these allegations plainly state that in a competitive market, apps developers could have sold their own apps to Plaintiffs without adding on the 30% fee that Apple forced Plaintiffs to pay in its monopolized apps aftermarket. Absent Apple's unlawful monopoly, consumers would have paid only

the apps developers' lower prices. Plaintiffs, therefore, unambiguously allege that Apple's fee was "on top of" the developers' costs, thus unquestionably demonstrating antitrust injury.

* * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

IN RE APPLE IPHONE ANTITRUST LITIGATION	CASE NO. C 11-06714-YGR RELATED CASE NO. C 07-05152-JW **DEFENDANT APPLE'S REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT** Date: November 5, 2013 Time: 10:00 AM Place: Courtroom 5, 2nd Floor The Honorable Yvonne Gonzalez Rogers

* * *

I. INTRODUCTION

* * *

Plaintiffs' Opposition now acknowledges that their Second Amended Complaint ("SAC" or "Complaint") does not use those words, but claims they use another "expression" that "mean[s] precisely the same thing." (Dkt. 116 ("Opp.") at 7.) That is not true. The particular allegation that

Plaintiffs point to (SAC ¶ 41) illustrates the game Plaintiffs are playing. It states that "the prices for apps available in Apple's App Store include the developers' price plus Apple's 30% mark-up." It does not state—despite the Court's express request for clarity on this point—that Apple's so-called "mark-up" was *added to* the developer's price. There is nothing about this phrasing nor the SAC's other allegations ("an extra 30% for every app," "Apple's 30% fee," and so on) that is different from the allegations in the complaint the Court deemed insufficient. There is no mystery why Plaintiffs won't simply state "Apple adds 30% to the developer's price": they know it is not true. Under the Ninth Circuit's *In re ATM Fee* decision, Plaintiffs are indirect purchasers without antitrust standing and the SAC should be dismissed with prejudice.

* * *

II. THE OPPOSITION CONFIRMS THAT PLAINTIFFS ARE INDIRECT PURCHASERS WHO LACK ANTITRUST STANDING UNDER *ILLINOIS BRICK*

* * *

B. Plaintiffs Have Failed To Allege That They Are Direct Purchasers, And Their Contrary Claims In Opposition Once Again Fail To Comport With The Actual Allegations Of Their Complaint

* * *

Plaintiffs First Amended Complaint alleged—correctly—that "Apple collects 30% of the sale of

each application, with the developer receiving the remaining 70%." (Dkt. 81 ¶ 5.) Faced with the *Illinois Brick* wall, Plaintiffs backtracked, trying to create the impression without actually saying that Apple itself added a separate fee on top of the developer's price. But the Court recognized that "[t]he allegations in the Amended Complaint *contradict* the arguments [Plaintiffs] made in opposition to Apple's Motion." (Dkt. 108 at 19, emphasis added.) These earlier allegations do not disappear now that Plaintiffs have filed the SAC.

Second, Plaintiffs' assertions that they have pled the requisite facts requested by the Court—and that Apple has "cherry-picked" allegations—are meritless. The changes Plaintiffs made in the SAC with respect to *Illinois Brick* avoid the key issue. We are here now because months ago, Plaintiffs told the Court that their earlier complaint alleged that "iPhone consumers were forced *to pay Apple* a 30% fee on top of the cost for the apps." (Dkt. 99 at 11, emphasis in original.) The Court correctly found Plaintiffs' claim to be false, but gave Plaintiffs leave to amend to actually include that allegation. (Dkt. 108 at 19-20.) *They have not done so*—because they can't, at least not truthfully. Their claim that the SAC says essentially the same thing, albeit in a "technical, less colloquial way" (Opp. at 7), is wrong.

Plaintiffs claim that the following allegation means "precisely the same thing" as the missing allegation:

> the prices for apps available in Apple's App Store include the developers' price plus Apple's 30% mark-up

(Opp. at 7; SAC ¶ 41.) Not so. It begs the key question, which is how Apple's supposed "markup" is included in the cost of the App. If it is "included" through pass-through dynamics, Plaintiffs do not have standing.

* * *

. . . As noted in Apple's motion, the SAC itself contains more allegations that reveal the truth. The SAC admits that "Apple takes its 30% commission off the top and then remits the balance, or 70% of the purchase price, to the developer," (¶ 41) and further alleges that "Apple always conditioned its 'approval' of such apps on the third party's agreement to give Apple *a share of the third party's sales proceeds*." (*Id.* ¶ 32, emphasis added.) These allegations show that Apple's allegedly wrongful conduct acts *on developers*, and that any effects on consumers are by definition indirect effects barred by *Illinois Brick*.

Were more needed to show that Plaintiffs have not sufficiently pled their claims, Plaintiffs include the following description of the SAC's allegations in their Opposition brief:

> "Taken collectively, these allegations plainly state that in a competitive market, **apps developers could have sold their own apps to Plaintiffs without adding on the 30% fee** that Apple forced plaintiffs to pay in its monopolized aftermarket." (Opp. at 8, emphasis added.)
>
> "[I]n 'a competitive apps distribution environment,' developers would be able to sell their own apps directly to consumers

> **'without charging Apple's 30% mark-up'. . . ."** (*Id.*, citing SAC ¶ 48, emphasis added.)

This, of course, is exactly the point: it is the App developers that decide whether to include some, none, or all of Apple's 30% commission in the price they set for their Apps. Whether or not Plaintiffs are correct in believing that App developers would not include Apple's 30% commission in the price they set for Apps if there were distribution outlets other than the App Store, any consumer "harm" results from those App developer decisions. What is crystal clear, from Plaintiffs' own allegations, is that Plaintiffs are *consumers* of Apps complaining about restrictions on App *developers* that allegedly indirectly affect the prices set by those developers. Plaintiffs' claims are thus barred by *Illinois Brick* and should be dismissed with prejudice.

* * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE YVONNE GONZALEZ ROGERS, JUDGE

IN RE APPLE IPHONE ANTITRUST LITIGATION	)	PAGES 1 – 18
	)	No. C 11-06714 YGR
	)	OAKLAND, CALIFORNIA
	)	TUESDAY, NOVEMBER 5, 2013

TRANSCRIPT OF PROCEEDINGS

* * *

[2]

* * *

THE COURT: GOOD MORNING.

MR. SCHMIDT, IN THE LAST ORDER WITH RESPECT TO THE MOTION TO DISMISS THAT WAS BROUGHT, I INDICATED SOME VERY SPECIFIC INFORMATION THAT I THOUGHT WAS NECESSARY TO ALLEGE. IN ANTITRUST CASES, IT IS THE COURT'S DUTY, I THINK TO -- TO BE VIGOROUS AND MAKE SURE THAT WE DO NOT ALLOW ANTITRUST CASES TO GO FORWARD UNLESS IT MEETS VERY -- THE STANDARD.

AND A NUMBER OF THOSE QUESTIONS STILL WEREN'T ANSWER, AND PERHAPS IT'S

BECAUSE YOU DON'T WANT TO ANSWER THEM. BUT IT APPEARS TO ME THAT THE COMPLAINT IS TRYING TO SKIRT AROUND THE ATM CASE, AND THAT GIVES ME CONCERN.

* * *

[5]

* * *

YOU -- YOU DEVOTE A FOOTNOTE TO SAYING YOU CAN'T TELL ME THAT YOU HAVE A FEE THAT APPLE ADDS BY SAYING THAT APPLE TAKES A COMMISSION. THOSE ARE DIFFERENT THINGS. AND -- AND THEY CAN'T SAY THAT BECAUSE THEY CAN'T ALLEGED ALLEGE IT IN GOOD FAITH. THAT'S --

LET'S BE CLEAR. THIS IS NOT SOMETHING THAT'S SECRET. APPLE SELLS -- HAS SOLD BILLIONS OF APPS TO MILLION OF CONSUMERS. IT NEVER ADDS A FEE. COUNSEL KNOWS THAT, SO HE'S NOT GOING TO SAY THAT WHEN ANGRY BIRDS IS PRICED AT 99 CENTS, APPLE ADDS 30 CENTS TO IT. HE'LL NEVER SAY THAT 'CAUSE HE CAN'T.

THE COURT: ALL RIGHT. STOP.

CAN YOU SAY THAT?

MR. SCHMIDT: YES. WE'RE SAYING IT BECAUSE THE DEVELOPER IS GOING TO -- IS GOING TO CHARGE WHAT ITS COST IS PLUS A MARGINAL REASONABLE RATE OF RETURN. IF THE DEVELOPER WERE ALLOWED TO SELL ANGRY BIRDS ON ITS OWN WEBSITE, WHICH IT CAN'T DO BECAUSE APPLE HAS

MONOPOLIZED THE WORLDWIDE DISTRIBUTION MARKET OF SOFTWARE FOR THE IPHONE, THE DEVELOPER WOULD CHARGE ITS COST PLUS REASONABLE RATE OF RETURN. IT WOULD CHARGE 66 CENTS. BUT BECAUSE APPLE NEEDS TO MAKE 30 PERCENT, THAT'S ITS MONOPOLY PROFIT.

* * *

MR. SCHMIDT: IT -- IT -- THE DEVELOPER INSTEAD [6] PRICES THE PRODUCT AT APPLE'S INSTRUCTION AT 99 CENTS. BUT APPLE DOESN'T PAY THE 30 CENTS. THE DEVELOPER DOESN'T PAY THE 30 CENTS. THE ONLY PERSON WHO PAYS THE 30 CENTS IS THE PERSON WHO BUYS THE IPHONE. THAT'S A DIRECT PURCHASER SITUATION.

IT -- WHETHER APPLE ITSELF CHARGES THE 30 CENTS OR IT TELLS THE DEVELOPER TO CHARGE THE 30 CENTS, IT DOESN'T MAKE A DIFFERENCE, BECAUSE THEN WHAT YOU'RE DOING IS YOU'RE EITHER A DIRECT PURCHASER OR YOU HAVE A COCONSPIRATOR SITUATION.

* * *

THE COURT: THERE IS NOTHING -- THERE IS NO -- WHERE IS THE ALLEGATION THAT SAYS THAT -- THAT APPLE REQUIRES THEM TO SELL IT AT A PARTICULAR PRICE? WHAT STOPS THE DEVELOPER FROM -- THE DEVELOPER CAN SELL IT FOR 69 CENTS, CAN'T THEY? THERE'S NO --

MR. SCHMIDT: YEAH, BUT --

* * *

[7]

THE COURT: LET ME FINISH.

MR. SCHMIDT: I'M SORRY.

THE COURT: THERE'S NO ALLEGATION IN HERE THAT SAYS THAT THEY CAN'T SELL IT FOR 69 CENTS.

MR. SCHMIDT: THERE -- THERE IS AN ALLEGATION IF YOU READ THE INFERENCES --

THE COURT: WHAT --

MR. SCHMIDT: -- FROM THE --

THE COURT: -- PARAGRAPH?

MR. SCHMIDT: THE ALLEGATION IS THAT THE DEVELOPERS --

THE COURT: WHAT PARAGRAPH?

MR. SCHMIDT: THERE'S A SERIES OF PARAGRAPHS, YOUR HONOR.

THE COURT: AND THEN YOU SAID, THERE WAS AN INFERENCE. WHY IS THERE AN INFERENCE? WHY CAN'T YOU JUST SAY IT?

MR. SCHMIDT: BECAUSE -- BECAUSE WE BELIEVE WE HAVE SAID IT, YOUR HONOR.

THE COURT: ALL RIGHT. SO WHERE? WHAT PARAGRAPH?

MR. SCHMIDT: OKAY. ON PAGE 5 OF THE BRIEF, WE SUMMARIZE ALL THE PARAGRAPHS --

THE COURT: I'M ASKING YOU TO TELL ME --

* * *

MR. SCHMIDT: OKAY. PARAGRAPH -- PARAGRAPH 41, [8] PARAGRAPH 8, PARAGRAPHS 3 TO 4, PARAGRAPHS 14, 46, 47, 48 --

* * *

MR. WALL: I THINK IT WAS PRETTY CLEAR THAT YOUR HONOR WANTED US TO DISTINGUISH BETWEEN -- WANTED PLAINTIFFS TO DISTINGUISH BETWEEN TWO DIFFERENT SCENARIOS. ONE -- SCENARIO ONE IS THAT THE DEVELOPER SETS A PRICE KNOWING THAT THIS 30 PERCENT COMMISSION IS GOING TO BE CHARGED IF IT'S A PAID APP -- REMEMBER, THIS ONLY APPLIES TO PAID APPS 'CAUSE FREE APPS COME WITH FREE DISTRIBUTION.

BUT IN THAT -- IN THAT SITUATION, WE'RE DEALING WITH THE PROBLEM THAT THE SUPREME COURT RAISED IN THE ILLINOIS BRICK DECISION AND IN ALL THE SUBSEQUENT DECISIONS, WHICH IS WE DON'T KNOW WHAT THAT PRICE WOULD HAVE BEEN BECAUSE THE DEVELOPER, WHO IS THE PERSON WHO IS PAYING FOR DISTRIBUTION SERVICES -- COUNSEL'S

SAYING THAT THE CONSUMER IS THE FIRST [9] PURCHASER.

NO, APPLE'S CHARGING FOR DISTRIBUTION. THAT'S WHAT THIS FEE DOES. IF YOU -- IF YOU HAVE TO DISTRIBUTE THROUGH THE APP STORE, THEN YOU'LL HAVE TO PAY A 30 PERCENT COMMISSION. SO THE WHOLE PROBLEM WITH THAT SCENARIO IS WE HAVE TO WONDER WHAT THE DEVELOPER WOULD HAVE CHARGED. AND THE SUPREME COURT SAYS BLACK-AND-WHITE RULE, WE WON'T GO DOWN THAT PATH.

NO MATTER HOW MUCH THAT COUNSEL THINKS THAT HE CAN SOLVE IT OR SAY THAT HOW PEOPLE WOULD HAVE BEHAVED, THE SUPREME COURT FLATLY PROHIBITS THAT INQUIRY.

THE ALTERNATIVE SCENARIO IS WHERE THE DEVELOPER HAS SET ITS PRICE. THE DEVELOPER HAS -- HAS EXERCISED IN ITS DISCRETION, SET A PRICE, AND THEN APPLE JUST GOES AND TACKS ON SOMETHING TO IT. IN THAT CASE, THE PRICE TO THE CONSUMER IS ELEVATED FROM WHAT THE DEVELOPER -- FROM THE PRICE THAT THE DEVELOPER SET.

THAT'S WHY THE TWO DIFFERENT SCENARIOS, THE PRICES ARE -- TO THE CONSUMER ARE DIFFERENT. WELL, THIS CASE IS CLEARLY THE FIRST SCENARIO, AND THAT'S THE POINT OF -- OF THE SECOND SLIDE, AND IT QUOTES THE LANGUAGE FROM THE -- FROM THE FIRST PARAGRAPH THAT

COUNSEL CITED TO YOU, WHICH IS PARAGRAPH 41.

AND WHAT PARAGRAPH 41 IS SAYING, IN THE SECOND SENTENCE, IS THAT APPLE TAKES ITS 30 PERCENT COMMISSION OFF THE TOP, THEN REMITS THE BALANCE OR 70 PERCENT OF THE PURCHASE PRICE TO THE DEVELOPER.

* * *

[12]

* * *

MR. SCHMIDT: . . . AND IF APPLE TELLS THE DEVELOPER, WHO THINKS IT NEEDS 99 CENTS TO TURN A REASONABLE PROFIT, THAT WE'RE GOING TO CHARGE 30 PERCENT OF YOUR PRICE, WE'RE GOING TO TAKE THIS 30 PERCENT COMMISSION, THEN THE DEVELOPER KNOWS THAT'S GOING TO BE GETTING 66 CENTS INSTEAD OF 99 CENTS TO -- TO MAKE A PROFIT, [13] AND THE DEVELOPER IS NOT GOING TO LOSE MONEY. SO WHAT'S THE DEVELOPER GOING TO DO? THE DEVELOPER IS GOING TO INCREASE ITS PRICE TO COVER APPLE'S -- APPLE DEMANDED PROFIT.

MR. WALL: AND --

MR. SCHMIDT: BUT -- BUT -- SO -- BECAUSE IT KNOWS THAT EVERY OTHER APP DEVELOPER IS DOING THE SAME THING. SO WHETHER APPLE CHARGES THE 30 PERCENT DIRECTLY -- IF APPLE BOUGHT THE APPS FROM THE DEVELOPER, AND THEN

INCREASED THE PRICE BY 30 PERCENT BECAUSE IT HAD A MONOPOLY AND THEN SOLD THE PRODUCT TO THE CONSUMER, THAT WOULD CLEARLY BE A DIRECT PURCHASER SITUATION.

THIS IS EXACTLY THE SAME THING. APPLE THINKS THEY CAN GET OUT FROM UNDER THIS BY TELLING THE APP DEVELOPER TO CHARGE ITS SUPER-COMPETITIVE PRICE FOR IT.

THE COURT: WHERE IS THE ALLEGATION THAT THEY DID THAT?

MR. SCHMIDT: IT'S --

THE COURT: IT IS --

(SIMULTANEOUS COLLOQUY.)

THE COURT: IT IS WHAT YOU WANT ME TO INFER. THERE IS NO ALLEGATION.

No. 17-204

In the Supreme Court of the United States

IN RE APPLE IPHONE ANTITRUST LITIGATION,

APPLE INC.,

Petitioner,

v.

ROBERT PEPPER, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF PETITIONER

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QUESTION PRESENTED

Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), and its progeny hold that the damages remedy in antitrust disputes belongs only to the immediate victims of the anticompetitive conduct ("direct purchasers"), and not to downstream parties claiming "pass-through" damages ("indirect purchasers"). In electronic marketplaces such as Apple's App Store at issue in this case, the marketplace sponsor interacts with and delivers goods "directly" to consumers, but as an agent on behalf of third parties—the app developers who price and sell their apps on the App Store. The district court dismissed this action under *Illinois Brick*, holding that consumer plaintiffs alleging monopolization of distribution services Apple provides to app developers were necessarily seeking pass-through damages. The Ninth Circuit reversed, holding—in an acknowledged split with the Eighth Circuit—that consumers can sue whoever delivers goods to them, even if they seek pass-through damages.

The question presented is: Whether consumers may sue for antitrust damages anyone who delivers goods to them, even where they seek damages based on prices set by third parties who would be the immediate victims of the alleged offense.

LIST OF PARTIES AND RULE 29.6 STATEMENT

Petitioner Apple Inc. is a nongovernmental corporate party with no parent corporation, and no publicly-held corporation owns 10% or more of its stock.

Respondents are Robert Pepper, Stephen H. Schwartz, Edward W. Hayter, and Eric Terrell, all of whom purchased an iPhone and purchased an iPhone software application during the alleged class period. Respondents purport to represent a class of similarly situated persons in the United States who purchased an iPhone software application from December 29, 2007 to the present.

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OPINION BELOW

The decision below is reported at 846 F.3d 313 (9th Cir. 2017). Pet. App. 1a-22a. The order denying rehearing *en banc* is unpublished. *Id.* at 38a-39a. The district court's decision dismissing the second amended consolidated class action complaint is unpublished. *Id.* at 23a-37a.

JURISDICTION

The court below entered judgment on January 12, 2017, and denied a timely rehearing petition on May 4, 2017. Pet. App. 1a, 38a-39a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2 of the Sherman Act, 15 U.S.C. § 2, makes it unlawful for any "person . . . [to] monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations."

Section 4 of the Clayton Act, 15 U.S.C. § 15(a), provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

INTRODUCTION

Ten years ago, Apple revolutionized software distribution by creating an electronic marketplace through which third-party software developers could distribute software applications ("apps") for Apple's then-new iPhone to all iPhone users. Apple called its new marketplace the App Store. The iPhone and App Store together were key drivers of the "smartphone revolution," as seamless access to millions of iPhone users drove an explosion of development and innovation in mobile apps. As this Court observed in another context, "[t]here are over a million apps available in each of the two major app stores; the phrase 'there's an app for that' is now part of the popular lexicon." *Riley v. California*, 134 S. Ct. 2473, 2490 (2014). The App Store was also widely emulated so that, today, app stores are commonplace, distributing not only iOS apps for iPhones and iPads, but apps for Android devices, desktop and laptop application software, content for gaming platforms, and much more.

A putative class of iPhone users who purchased iPhone apps nevertheless claims that Apple illegally monopolized "the worldwide distribution market for iPhone applications." Pet. App. 41a (¶ 3). They complain that Apple requires all iOS apps to be approved and distributed by Apple alone, allowing Apple to charge excessive distribution commissions, which lead to higher app prices. Indeed, Apple does require iOS developers to submit iOS apps to Apple for review for malware and similar issues. Approved native iOS apps are then distributed solely through the App Store (otherwise developers could circumvent the approval process). And for paid apps (many are

free), Apple charges developers a 30% commission. However, the developer always independently sets its app prices. Apple does not set app prices for third-party developers. *See* U.S. Invitation Br. 2 ("Apple does not take ownership of third-party apps sold through the App Store, but instead acts as the developers' agent and completes the sales on their behalf.").

The threshold question is whether end-user consumers have standing to seek antitrust damages based on allegedly monopolistic commissions on app distribution—a service that iOS developers, not end-users, buy from Apple. The answer is found in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), and *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), where this Court interpreted Section 4 of the Clayton Act, 15 U.S.C. § 15(a), to mean that in alleged overcharge cases (such as this) the party who pays the alleged overcharge first and directly can sue for the whole amount, and other parties who are harmed only insofar as the first party passed on some or all of the claimed overcharge do not have a damages remedy.

The *Illinois Brick* doctrine, as it has become known, was grounded in part on common law principles favoring direct over indirect damages claims, in part on the Court's desire to avoid conflicting and duplicative damages, and in part on this Court's judgment that attempting to allocate overcharges among purchasers along a distribution chain is complex and would thus substantially raise the costs, and dampen the vigor, of antitrust enforcement. It was reaffirmed by this Court in *Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199, 204 (1990). And notwithstanding criticism and efforts to

have Congress overturn it, the *Illinois Brick* doctrine has endured as a staple of American antitrust law for four decades.

The district court understood *Illinois Brick* correctly. When Apple moved to dismiss, the district court focused on the right issue—whether Respondents' damages theory depends on developers passing through an overcharge to consumers. Respondents first tried obfuscating by refusing to say who sets app prices, even though the answer—that app developers do, and that Apple sells apps at exactly those prices—is common knowledge. But the district court insisted on clarity with respect to who sells exactly what to whom, and what that means for Respondents' damages theory. After two rounds of briefing and argument, the district court concluded that the complaint is fairly read to allege that developers pay Apple's commissions, developers set their app prices in light of those commissions, and therefore, to the extent that app prices are supracompetitive, that has to be because developers are passing-through an overcharge. The court properly held that overcharge theory is barred by *Illinois Brick*.

The Ninth Circuit reversed, holding that consumers can sue Apple for these commissions simply because Apple performs the marketplace "function" of a "distributor." Pet. App. 20a-21a. The dispositive functions were processing and fulfilling online app purchases. The Ninth Circuit held that it does not matter who is actually pricing the apps, whether a plaintiff's case depends on a pass-through theory of harm, or even whether the developers might have a cause of action to recover the exact same

commissions. *Id.* at 19a-21a. Identifying the "distributor" is all that matters.

The Ninth Circuit's decision is contrary to this Court's precedent and its underlying policy objectives. It elevates and makes dispositive economically insignificant facts, while going out if its way to say that the concerns about pass-through and duplicative recovery evident in each of *Hanover Shoe*, *Illinois Brick*, and *UtiliCorp* do not matter. That leads to the outcome favored by the *dissent* in *Illinois Brick*, in which Justice Brennan argued that consumers should always have a damages remedy. *See Illinois Brick*, 431 U.S. at 761-65 (Brennan, J., dissenting). Indeed, the author of the Ninth Circuit opinion made clear at the opening of oral argument that he was "sympathetic" to Respondents' position because he "think[s] Justice Brennan got it right in *Illinois Brick*."[1] But that position did not prevail. Not in *Illinois Brick*, not in *UtiliCorp*, and not in countless cases in the lower courts that have readily understood that if a damages claim presents a pass-through issue and a threat of duplicative recovery, it is barred by *Illinois Brick*.

In this case, the pass-through issue is clear and unavoidable, and not the least bit lessened by Apple's role in selling and delivering apps to iPhone users. Respondents do not allege that Apple monopolized *apps*, but rather *distribution services*, an entirely different "upstream" product that consumers do not purchase at all. In that context, the transactional connection between Apple and app purchasers is not

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[1] CA9 Oral Argument at 4:20 (Feb. 10, 2016), http://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000009059 (question from Judge Fletcher).

meaningful for the *Illinois Brick* issue. The Eighth Circuit understood this twenty years ago, holding that a direct transactional relationship with consumer-plaintiffs does not matter when the complaint is about alleged anticompetitive conduct *that first affects someone else* (concert venues in that case, app developers here), and the prices consumers pay are inflated, if at all, because of how those other parties react to the allegedly anticompetitive conduct. *Campos v. Ticketmaster Corp.*, 140 F.3d 1166, 1171-72 (8th Cir. 1998), *cert. denied*, 525 U.S. 1102 (1999).

And fundamentally, Respondents' argument disregards this Court's history of rejecting antitrust arguments based on "formalistic distinctions rather than actual market realities." *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 466-67 (1992). Pigeonholing Apple into some "distributor" box is empty formalism. The actual market reality of this case is that app prices are independently set by developers and will reflect any overcharge on distribution services only and to the extent that the developers choose to pass-through the allegedly supracompetitive distribution costs in their app prices. That is what matters to *Illinois Brick*, not how app orders are processed and fulfilled.

The Ninth Circuit's decision should be reversed, and the district court's dismissal reinstated.

STATEMENT OF THE CASE

This matter is before this Court after an appeal from a ruling on Apple's motion to dismiss. Consistent with *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), we therefore assume the truth of all well-pleaded facts.

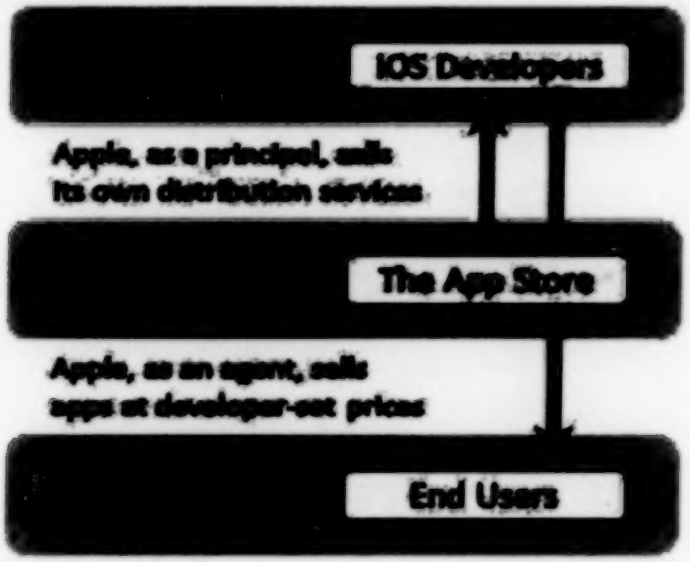
A. iPhone, Apps, And The App Store

In June 2007, Apple introduced the iPhone, the company's first cellular telephone product. Pet. App. 41a (¶ 2). The iPhone was a "novel," "revolutionary," and "breakthrough" product that "shifted the paradigm for smartphones, and . . . changed the entire cell phone manufacturing industry." *Id.* at 42a, 41a, 48a (¶¶ 7, 2, 26).

One of Apple's most substantial innovations associated with the iPhone involved add-on software applications—apps—that run natively on the iOS operating system. *Id.* at 49a (¶ 30). Apple designed, from the ground up, an ecosystem for the use, development, sale, and distribution of apps. That ecosystem has two relevant features: (1) iPhones will only download third party software that Apple has reviewed for malware and offensive content, among other things, and (2) to distribute those third party apps, Apple created a new kind of software distribution platform, the App Store. *Id.* at 49a, 51a (¶¶ 30-31, 37). The apps themselves, however, are created and developed by tens of thousands of registered iOS app developers; Apple itself develops only a handful.

The history of the App Store began in March 2008, when Apple released a "software development kit" for third-party developers to create approved apps for the iPhone. *Id.* at 41a, 51a-52a (¶¶ 2, 38-40). A few months later, in July 2008, Apple launched the App Store, the world's first electronic marketplace for developers to offer and distribute mobile phone apps. *Id.* at 51a (¶ 39). Apple structured the App Store as an agency-based, two-sided marketplace for

connecting developers and consumers, as depicted below:[2]



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[2] The graphic illustrates allegations found in Respondents' Complaint, *inter alia*, at Pet. App. 49a-52a (¶¶ 30, 32, 37-41). Respondents have also stated in briefing that "Apple's App Store functions like a virtual consignment store," in that "[r]ather than following the traditional wholesale-retail merchandising model and buying apps from the developers and reselling the apps to customers at a profit, Apple places the developers' apps on the virtual shelves of its App Store, sells them directly to iPhone customers, charges and collects the full price (including its own 30% fee) from customers, keeps its 30% fee from every sale or license, and then remits the balance of the purchase price to the developer." *See* Pepper CA9 Br. 9. That is correct save for the reference to "consignment" (a specific type of agency relationship that includes a bailment and a different settlement flow). The graphic captures the important point—the agent/principal nature of the relationship between Apple and app developers.

Apple provides a variety of services to developers, including reviewing apps for safety and compatibility, hosting the App Store, acting as the developers' sales and delivery agent, collecting the purchase price (if any) from consumers on the developers' behalf, and remitting proceeds to developers from around the world. And as much or more important than any of this, Apple connects the developers to every one of the many tens of millions of iPhone (and iPad) users worldwide. In return, developers agree to pay Apple an annual $99 membership fee, and a 30% commission on their sales revenue from paid apps and in-app purchases. *Id.* at 51a-52a (¶¶ 38, 41).[3] App developers alone decide whether to charge for an app or its content and, if so, the price (ending in 99 cents) that consumers must pay.

Apple's innovations regarding the iPhone, iOS operating system, and App Store created a dynamic new industry where none had existed before. The App Store launched with 500 apps.[4] Respondents acknowledge that as of 2012, just four years into its existence, the App Store "offer[ed] more than 850,000 apps" (Pet. App. 43a (¶ 9)); today, there are over *2 million* apps offered through the App Store. Apple remitted $26.5 billion to iOS developers last year

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[3] The operative complaint mentions only paid apps in the sense that there is an up-front price to acquire the app. Many apps are initially free, but the developer offers additional content that consumers may acquire through in-app purchases. Apple's commission structure also has additional nuances that we ignore because they were not pleaded, *e.g.*, lower commission rates on subscriptions.

[4] *See* Press Release, *The App Store turns 10* (July 5, 2018), https://nr.apple.com/dE4w5d2A2Y.

alone.[5] The App Store has been so successful in facilitating app development that some commentators argue it was as much or more important than the iPhone itself to the way that smartphones changed our daily lives.[6]

Respondents, who are consumers of paid third-party iOS apps, nevertheless contend that Apple violated the antitrust laws by adopting a "closed" distribution system for iPhone apps, which they say allows Apple to charge an allegedly excessive 30% commission. Pet. App. 41a-43a, 45a, 49a, 51a-52a, 54a-55a (¶¶ 4, 6-8, 14, 30-31, 40-41, 48, 50). They advance two claims under § 2 of the Sherman Act—for monopolization and attempted monopolization of

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[5] Apple periodically reports these payments. *See* Press Release, *Apple Store kicks off 2018 with record-breaking holiday season* (Jan. 4, 2018), https://nr.apple.com/dE3h2n8x2O; *The App Store turns 10* (July 5, 2018), https://nr.apple.com/dE4w5d2A2Y.

[6] The recent tenth anniversary of the App Store generated numerous retrospectives on its revolutionary effects. *See, e.g.*, Michael Leidtke, *How Apple's App Store Changed Our World*, U.S. News & World Report (July 10, 2018), https://www.usnews.com/news/business/articles/2018-07-10/how-apples-app-store-changed-our-world; Andreas Goeldi, *The Smartphone Revolution: Why the App Store Was More Important Than the iPhone*, Innospective (June 21, 2018), https://innospective.net/the-smartphone-revolution-why-the-app-store-was-more-important-than-the-iphone/ ("Most people think of the first iPhone as the product that triggered the smartphone revolution. . . . I would argue that *the really transformational product was another one of Apple's innovations: The iPhone app store.*").

a supposed "aftermarket" limited to distribution services for iPhone apps. *Id.* at 60a-62a (¶¶ 70-80).[7]

B. District Court Proceedings

The procedural history of this case is convoluted. It originated as the second of three putative class actions filed by the same plaintiffs' counsel alleging that Apple violated the antitrust laws by imposing certain limitations on the iPhone. The first and third cases asserted the theory that Apple had unlawfully granted AT&T Mobility ("ATTM") a "monopoly" over voice and data cellular service for the iPhone by agreeing to let ATTM be the exclusive service provider for the iPhone in the first few years following its launch. *See In re Apple & AT&TM Antitrust Litig.*, 596 F. Supp. 2d 1288, 1294-96 (N.D. Cal. 2008); Complaint ¶¶ 44-54, *Ward v. Apple Inc.*, No. 12-cv-5404-YGR (N.D. Cal. Oct. 19, 2012), ECF No. 1. This case, in its current iteration, focuses solely on native iOS apps and Apple's decision that they would be curated by Apple and sold and delivered exclusively through the App Store. Pet. App. 41a-43a, 45a, 51a-52a, 54a-55a (¶¶ 4, 6-8, 14, 40-41, 48, 50).

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[7] Apple accepts that the antitrust merits are not the focus of this proceeding. Still, Respondents' allegation that the iOS app ecosystem is "closed" and anticompetitive is manifestly untrue. The iPhone and Apple's curated App Store distribution model resulted in one of the greatest explosions of output in history. And it makes no sense to call a marketplace in which tens of thousands of iOS developers are offering over 2 million apps "closed." *See generally* Slinger Jansen & Ewoud Bloemendal, *Defining App Stores: The Role of Curated Marketplaces in Software Ecosystems* (manuscript), https://pdfs.semanticscholar.org/ec26/1e70056f825883f208533b95eb432c582a94.pdf (last visited Aug. 1, 2018).

Apple initially moved to dismiss the complaint under *Illinois Brick*, on the basis that plaintiffs had not alleged and could not allege anything other than a pass-through injury. The motion was grounded in a then-recent Ninth Circuit decision holding, on the one hand, that "*Illinois Brick* rejected . . . 'mark up' claims," even if the plaintiff and defendant transacted business directly, but leaving open the possibility of antitrust standing for parties who paid an unlawfully "fixed fee" to one of the parties who fixed it. *In re ATM Fee Antitrust Litig.*, 686 F.3d 741, 753 (9th Cir. 2012) ("*ATM Fee*"), *cert. denied*, 571 U.S. 944 (2013).[8] Apple's motion therefore crystallized into a dispute over who sets the price consumers pay, whether there was a developer mark up, and if so how it is related to Apple's commission.

Plaintiffs repeatedly argued that Apple adds a 30% charge *on top* of the app price set by the developer, such that there was no developer "mark up," but rather a case where the "Plaintiffs paid the alleged unlawful price – here Apple's 30% fee – directly to Apple." JA72-73; *see also* JA75-76, 129, 130-31. But they would never explicitly allege in any complaint that Apple sets app prices or adds anything to the prices developers set.[9] They could not, since it

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[8] The Ninth Circuit's decision in *ATM Fee* affirmed *In re ATM Fee Antitrust Litigation*, No. C 04-002676-CRB, 2010 WL 3701912 (N.D. Cal. Sept. 16, 2010) (Breyer, J.). Both Judge Breyer and the Ninth Circuit concluded that the *ATM Fee* plaintiffs were not paying an illegally fixed fee, but a different and derivative fee that would harm plaintiffs only because of pass-through.

[9] As a matter of economics the two are not the same. While the pass-through issue might indeed go away if Apple had *carte*

is common knowledge—reflected in many thousands of iOS developer agreements—that developers set their app prices, with knowledge that they would pay Apple a 30% commission from the purchase price. A brief overview of how the district court sought clarity on this issue is illuminating.

In its August 15, 2013 decision granting Apple's initial motion to dismiss, the district court noted that, notwithstanding the importance of pass through to an *Illinois Brick* analysis, "[n]owhere do Plaintiffs explain how Apple's conduct results in increased 'prices' or how said prices were paid." JA113-14. The court recognized that while Respondents had argued *in briefing* that "iPhone consumers were forced *to pay Apple* a 30% fee on top of the cost for the apps," *id.* at 114 (citation omitted), their complaint "does not provide that the [complained-of] fee is paid 'on top of' the cost of" the App, but rather that "'Apple collects 30% of the sale of each application, with the developer receiving the remaining 70%.'" *Id.* at 114 n.14 (citation omitted). Given that ambiguity, the district court gave Respondents an opportunity to amend their complaint "to address antitrust standing and *Illinois Brick*." *Id.* at 114.

In response, Respondents filed the operative complaint, which alleges *inter alia* that (i) "Apple always conditioned its 'approval' of such apps on the third party's agreement to give Apple a share of third party's sales proceeds," (ii) "the full purchase price[] includ[es] Apple's 30% commission," which is paid

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blanche authority to set app prices, it exists whenever developers set prices—irrespective of whether the allegedly supracompetitive commission rate is added to or subtracted from the developer's price.

directly to Apple, and (iii) "Apple takes its 30% commission off the top and then remits the balance, or 70% of the purchase price, to the developer." Pet. App. 49a-50a, 52a (¶¶ 32, 41).

Apple filed a renewed motion to dismiss, based largely on these admissions and Respondents' failure to allege that Apple adds a fee—any fee—to the price set by developers for their apps. JA122-23. Apple explained that Respondents' allegations "studiously avoid a simple declarative sentence that Apple takes a price that has been established by the developer and adds 30% (or anything) to that," even though the district court had been crystal clear that the distinction was important to its consideration. *Id.* at 124.

At the motion to dismiss hearing, the district court addressed this issue: "I indicated some very specific information that I thought was necessary to allege" and "a number of those questions still weren't answer[ed], and perhaps it's because [Respondents] don't want to answer them." *Id.* at 137-38. When pressed further by the district court about who sets the price consumers pay, Respondents ultimately admitted that: "If Apple tells the developer, who thinks it needs 99 cents to turn a reasonable profit, that we're going to charge 30 percent of your price, . . . then the developer knows that's going to be getting 66 cents instead of 99 cents to . . . make a profit . . . . So what's the developer going to do? The developer is going to increase its price to cover Apple's . . . demanded profit." *Id.* at 143.

That was clear enough. The district court granted Apple's renewed motion to dismiss, writing that "the [Second Amended Complaint] is fairly read to complain about a fee created by agreement and borne

by the developers to pay Apple 30% from their own proceeds—an amount which is passed-on to the consumers as part of the purchase price." Pet. App. 36a. The district court further stated that "[d]espite the Court's instruction to do so if they could, Plaintiffs do not allege in the SAC any price 'fixed' by Apple." *Id.* Rather, "the 30% figure for which Plaintiffs complain is . . . a cost passed-on to consumers by independent software developers," such that "any injury to Plaintiffs is an indirect effect resulting from the software developers' own costs." *Id.* at 37a.

C. The Ninth Circuit's Decision

The Ninth Circuit reversed. Pet. App. 22a.

The Ninth Circuit's decision contains no discussion of whether Respondents were injured directly or indirectly, or whether they were the first purchaser or an "indirect" purchaser of the relevant product. It contains no discussion of whether Respondents' damages claim depends on a "pass-through" theory of harm raising the issues of apportionment and double recovery that concerned this Court in *Illinois Brick* and *Hanover Shoe*. Nor does it so much as cite the Ninth Circuit's own *ATM Fee* decision, which followed and applied *Illinois Brick* faithfully. Instead, the panel asserted that "[t]he key to the analysis is the function Apple serves." *Id.* at 20a-21a. The panel held that there is a "fundamental distinction between a manufacturer or producer, on the one hand, and a distributor on the other," that the "distributor" is the party "who 'supplies the product directly to' plaintiffs," and that consumers always have standing to sue a distributor, no matter what. *Id.* at 19a-21a (citation omitted). Under this "bright line" approach, the panel reasoned that because Apple sells and delivers apps to the consumer it acts as a

"distributor," and therefore consumers must be direct purchasers and entitled to sue Apple for damages—regardless of the actual commercial arrangements, or the actual theory of harm. *Id.* at 21a.

The Ninth Circuit explained in some detail what, in its view, *did not* matter. The fact that "Apple does not take ownership of the apps and then sell them to buyers after adding a markup" was unimportant because "the distinction between a markup and a [sales] commission is immaterial. . . . The key to the analysis is the function Apple serves rather than the manner in which it receives compensation for performing that function." *Id.* at 20a-21a.

The Ninth Circuit also emphasized that it "d[id] [not] rest [its] analysis on who determines the ultimate price paid by the buyer of an iPhone app." *Id.* at 21a. Indeed, the Ninth Circuit's indifference to that issue led it to be careless about the record. It stated correctly that "the price is determined as a practical matter by the app developer," but incorrectly that "Apple's thirty percent commission is added automatically" to that price—which is factually and mathematically wrong (it is subtracted from a developer-set price) and exactly the point the district court worked so diligently and successfully to clarify. *Id.* And "who determines the ultimate price" is not something to be careless about, since if developers are setting app prices, those prices would only increase through developer pass-through decisions. *Id.*

The Ninth Circuit also held that "whether app developers are direct purchasers of distribution services from Apple in the sense of *Illinois Brick* makes no difference to our analysis." *Id.* at 20a. This was despite the panel's recognition that an affirmative answer to that question "would

necessarily imply that the developers, as direct purchasers of those services, could bring an antitrust suit against Apple" for the same commissions Respondents challenge here. *Id.* The panel thus opened the door to duplicative recoveries for the exact same commission (trebled each time) by different plaintiff groups under different characterizations of the same transaction.

The Ninth Circuit acknowledged that its decision created a circuit split with the Eighth Circuit's decision in *Campos*. *See id.* at 19a ("We disagree with the majority's analysis in *Ticketmaster*.").

Apple sought rehearing *en banc*, but the court of appeals denied the petition without opinion. *Id.* at 38a-39a. This Court called for the views of the Solicitor General, who advised that the Ninth Circuit's decision is inconsistent with this Court's precedent and merits review. This Court granted certiorari.

SUMMARY OF ARGUMENT

In *Hanover Shoe* and *Illinois Brick*, this Court resolved longstanding confusion and practical difficulties in federal antitrust litigation by interpreting Section 4 of the Clayton Act to embrace two complementary principles. The first party that directly pays an alleged overcharge has a complete and undiluted cause of action for the entire overcharge. No one, however, can sue to recover "pass through" injuries. Those holdings are grounded in common law principles about directness of injury and avoiding duplicative recoveries, this Court's judgment that concentrating the antitrust cause of action in the most efficient enforcer promotes optimal enforcement, and this Court's strong desire to save antitrust

litigation from the costs and complexity of apportioning overcharge claims among competing plaintiffs. *See generally* William M. Landes & Richard A. Posner, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of* Illinois Brick, 46 U. Chi. L. Rev. 602 (1979).

The damages cause of action asserted by Respondents is contrary to that settled law. It depends on precisely the sort of "pass through" theory of harm that *Illinois Brick* is designed to prohibit. In fact, it depends on conducting a prohibited pass-through analysis millions of times, because the required economic analysis must be undertaken app-by-app and Respondents have styled their claim as a class action covering all United States purchasers of all iPhone apps.

Permitting Respondents' damages action also invites duplicative recoveries. The Ninth Circuit's decision is openly indifferent to the prospect that both consumers and iOS developers would seek treble damages from Apple for the same alleged overcharge. That is irreconcilable with this Court's doctrine. *Illinois Brick* refused "to 'open the door to duplicative recoveries' under § 4," 431 U.S. at 731 (citation omitted), and *UtiliCorp* reaffirmed that principle, 497 U.S. at 212-13.

Respondents' damages claim also depends on a deliberate indifference to the context of Apple's "direct" sales of apps to consumers and their own theory of antitrust injury. It is true that Apple sells and delivers apps to consumers—which to the Ninth Circuit is all that matters. But this is a case about the alleged monopolization of *app distribution*, not apps. Respondents' theory is that Apple is charging

developers too much for app distribution, causing *the developers* to raise app prices. Furthermore, as Respondents have themselves noted, *see* Pepper CA9 Br. 9, Apple sells those apps at precisely the prices developers have set. In that context, Apple's sales and fulfillment functions are irrelevant to the *Illinois Brick* analysis: the allegedly higher app prices are necessarily the result of developer pass-through decisions, which bars Respondents' damages claims.

The Ninth Circuit ignored all of this. It set out to replicate the outcome favored by the dissent in *Illinois Brick*, but with a peculiar logic that finds no support in this Court's decisions (or even Justice Brennan's dissent). Instead of pass-through and the threat of duplicative recoveries, the Ninth Circuit held that "[t]he key to the analysis is the function Apple serves"—specifically, whether it is a distributor. Pet. App. 20a-21a. But that is immaterial to this Court's doctrine. The *Illinois Brick* rule is about pricing dynamics and specifically the difficulty of trying to figure out how the party that first bears an overcharge will adjust its pricing to pass some or all of it on to the next level of the market. Who processes the sale, collects the purchase price, and delivers the goods makes no difference at all.

The Ninth Circuit's "distributor function" rule is *especially* wrong in the case of agency-based electronic marketplaces like the App Store. Even if there were some principled, economic basis for focusing on distribution functions to the exclusion of all else—and there is not—it cannot apply to sales agents who follow their principals' instructions as to what price to charge. *See generally United States v. Gen. Elec. Co.*, 272 U.S. 476 (1926) (rejecting claim that a principal and agent could conspire to fix prices,

since the agent was obligated to charge prices set by its principal). In this increasingly important business model for electronic commerce, looking away from the pricing decision and only toward who takes the order and delivers the goods will lead to the wrong answer every time.

ARGUMENT

I. A STRAIGHTFORWARD APPLICATION OF *ILLINOIS BRICK* BARS RESPONDENTS' DAMAGES CLAIM

A. Under *Illinois Brick* And *Hanover Shoe*, The Party First And Directly Injured By An Alleged Overcharge Has The Entire Damages Claim

Section 4 of the Clayton Act provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained." 15 U.S.C. § 15(a). This Court's long-standing precedent in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), and its predecessor, *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), have construed this language to consolidate the damages cause of action in one party (or set of like parties) and prohibit the use of pass-on theories by both plaintiffs and defendants.

In *Hanover Shoe*, this Court held that an antitrust defendant cannot lessen its exposure to damages with a pass-through *defense*, *i.e.*, it cannot say that the plaintiff suffered no loss or less loss because it had passed on an overcharge, in whole or in part, to its own customers. 392 U.S. at 489, 492. Rather, the Court held that a plaintiff who purchased goods or

services at an inflated price as a result of anticompetitive conduct by a supplier has suffered damage in the *full amount* of the overcharge. *Id.* at 487-91.

Justice White's opinion relied on a variety of early overcharge cases for the proposition that "'[t]he general tendency of the law, in regard to damages at least, is not to go beyond the first step" and inquire into "the possibility that plaintiffs had recouped the overcharges from their customers.'" *Id.* at 490 & n.8 (quoting *Southern Pac. Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533 (1918)). But in addition, the Court held that "[t]reble damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness" if pass-on defenses were permitted. *Id.* at 494. Since "[a] wide range of factors influence a company's pricing policies," allowing even a limited pass-on defense would inevitably lead to "complicated proceedings involving massive evidence and complicated theories"—seriously threatening the vitality and practicality of antitrust enforcement. *Id.* at 492-93.

In *Illinois Brick*, this Court addressed the other side of the same coin—whether an indirect purchaser, who bears an overcharge only to the extent that it was passed on by a direct purchaser, can sue for damages. 431 U.S. at 724. The Court began by declining invitations to reconsider its holding nine years earlier in *Hanover Shoe*, "bear[ing] in mind that considerations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation." *Id.* at 736. The Court then explained in detail that all of the reasons for its *Hanover Shoe*

holding also supported a parallel rule that plaintiffs cannot introduce pass through and apportionment issues *offensively*. Allowing pass-on theories of injury under Section 4 "would transform treble-damages actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge" and "seriously undermine the[] effectiveness" of the antitrust laws. *Id.* at 737-38. In this Court's view, "the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers rather than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it." *Id.* at 734-35.[10]

The Court also emphasized that "allowing offensive but not defensive use of pass-on would create a serious risk of multiple liability for defendants." *Id.* at 730. "Even though an indirect purchaser had already recovered for all or part of an overcharge passed on to it, the direct purchaser would still recover automatically the full amount of the overcharge that the indirect purchaser had shown to be passed on . . . ." *Id.* The Court rejected the argument that "a little slopover on the shoulders of the wrongdoers . . . is acceptable." *Id.* at 731 n.11

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[10] This is the origin of what has become known as the "efficient enforcer" element of antitrust standing—the idea that that antitrust enforcement is optimized when the right to seek damages is given to the category of plaintiffs likely to be the most efficient enforcers of the antitrust laws. *See* Landes & Posner, 46 U. Chi. L. Rev. at 609 ("The direct purchaser is a more efficient enforcer of the antitrust laws than the indirect purchaser because of the former's closer proximity to the violator.").

(alteration in original) (citation omitted). To the contrary, quoting *Hawaii v. Standard Oil Co. of California*, 405 U.S. 251, 264 (1972), the Court was "unwilling to 'open the door to duplicative recoveries' under § 4." 431 U.S. at 731.

Justice Brennan dissented, arguing as a matter of statutory construction that Congress intended for consumers to always have a damages claim. In particular, the dissent perceived from then-recent legislation allowing *parens patriae* actions by States on behalf of their citizens that Congress must have favored consumer class actions generally, irrespective of whether they presented pass-through issues. *Id.* at 765 n.24 (Brennan, J., dissenting). The *Illinois Brick* majority rejected this argument. *Id.* at 733 n.14. The dissent also argued that apportioning an overcharge among various parties within a distribution chain is no more difficult than other challenges in antitrust litigation. *See id.* at 758-59 & n.14. The majority disagreed with that too, adding: "In any event, as we understand the dissenters' argument, it reduces to the proposition that because antitrust cases are already complicated there is little harm in making them more so. We disagree." *Id.* at 743 n.27.

The Court reaffirmed its *Illinois Brick* analysis in *UtiliCorp*, which addressed who may sue "when, in violation of the antitrust laws, suppliers overcharge a public utility for natural gas and the utility passes on the overcharge to its customers." 497 U.S. at 204. Two states, suing as *parens patriae* on behalf of consumers and state agencies that purchased natural gas from the defendant utility, argued that indirect purchaser suits should be allowed "in cases involving regulated public utilities that pass on 100 percent of their costs to their customers." *Id.* at 208. The Court

disagreed, reasoning that there was a pass-through issue even on these facts, and it would be "an unwarranted and counterproductive exercise to litigate a series of exceptions" to *Illinois Brick* simply because some cases are easier than others. *Id.* at 217. "Having stated the rule in *Hanover Shoe*, and adhered to it in *Illinois Brick*, we stand by our interpretation of § 4." *Id.*[11]

The rule derived from these precedents is that "the overcharged direct purchaser, and not others in the chain of manufacture or distribution, is the party 'injured in his business or property' within the meaning of the [Clayton Act]." *Illinois Brick*, 431 U.S. at 729.

B. Respondents' Claim Depends On A Prohibited Pass-Through Theory Of Harm

Respondents' theory of harm presents the pass-through problem that *Illinois Brick* is designed to avoid. Respondents complain that the 30% commission that Apple charges app developers is excessive, and causes developers to set higher prices for their apps to consumers than they otherwise would. *See* Pet. App. 43a, 52a (¶¶ 8, 41). The district court explained that Apple's commission is first "borne *by the developers*" and then allegedly "passed-

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[11] Notably, even Justice White's dissent agreed "it would unduly complicate litigation to require courts to separate the portion of the overcharge absorbed by the direct purchaser from the portion of the overcharge passed onto the indirect purchaser." *UtiliCorp*, 497 U.S. at 223 (White, J., dissenting). Justice White dissented in *UtiliCorp*—after authoring the Court's opinion in *Hanover Shoe*—strictly because he did not believe that pass-through issues arose *at all* in the case of regulated utility rates. *Id.* at 224.

on to the consumers as part of the purchase price" the developers set. *Id.* at 36a. Respondents likewise acknowledge that any higher app prices result from decisions by developers to "mark-up the price [of their apps]" in order to recover some or all of Apple's commission. Pepper CA9 Br. 35 n.10. As the United States explained, the extent of any injury to app purchasers thus "depends on whether [the challenged] Apple practices have caused developers to increase the prices charged for their apps in the App Store," and "[t]o determine whether third-party app developers would have charged lower prices in a hypothetical market in which they were freed from Apple's allegedly unlawful practices, a court would need to conduct precisely the sort of pass-on analysis that the Court in *Illinois Brick* rejected." U.S. Invitation Br. 14.

Under this Court's precedents, that ends the inquiry. It does not matter whether the pass-through issues are relatively easy or complex. *See Illinois Brick*, 431 U.S. at 744-45 (rejecting efforts to "classify[] various market situations according to the amount of pass-on likely to be involved and its susceptibility of proof in a judicial forum"); *UtiliCorp*, 497 U.S. at 217 (litigating exceptions to *Illinois Brick* is "unwarranted and counterproductive"). Nevertheless, to underscore how much of the economic substance of this case was "written out of the script" by the Ninth Circuit's erroneous reasoning, it is worth pausing a moment to consider the unusual complexity of the pass-through issues here.

Damages in indirect purchaser actions depend on "the pass-through rate"—the extent to which a firm increases its price due to a marginal increase in cost,

including that from an overcharge. Simplistically, the pass-through rate depends on the degree to which demand and supply conditions allow the direct purchaser to profitably raise downstream prices. *See Illinois ex rel. Hartigan v. Panhandle E. Pipe Line Co.*, 852 F.2d 891, 894 (7th Cir.) (Posner, J.) ("A direct purchaser who finds himself paying a higher price for inputs would love to pass on all of the additional cost to his customers in the form of a higher price, but [often] he cannot do so, because a price that much higher will so reduce the demand for his product that his profits will fall unacceptably."), *cert. denied*, 488 U.S. 986 (1988).

More technically, the pass-through rate depends (among other things) on the slope and shape of the demand and supply curves the seller faces and the resulting elasticities. "The steeper (less elastic) the demand curve or the flatter (more elastic) the supply curve, the more of the tax or cost increase that will be borne by the next level of the distribution chain." Chris S. Coutroulis & D. Matthew Allen, *The pass-on problem in indirect purchaser class litigation*, 44 Antitrust Bull. 179, 197-98 (1999); *see also Illinois Brick*, 431 U.S. at 741 (explaining how, "[u]nder an array of simplifying assumptions," economic theory predicts the pass-through rate based on "the ratio of the elasticities of supply and demand in the market for the passer's product").

The starting point for any pass-through analysis is therefore the "serious problem of measuring the relevant elasticities." *Illinois Brick*, 431 U.S. at 742. In practice these values are never known; they are instead estimated econometrically—and litigated vigorously. Indirect purchaser plaintiffs invariably take the position that the direct purchasers face

demand conditions that allow for robust pass-through (sometimes greater than 100 percent). Defendants ordinarily contest that. Complex "battles of the experts" ensue.

The exceptional feature of this case is that there are millions of apps sold—and priced—by tens of thousands of iOS developers. As noted, the operative complaint, drafted in 2012, alleges that "Apple now offers more than 850,000 apps, and iPhone consumers worldwide have downloaded apps more than 50 billion times since July 2008." Pet. App. 43a (¶ 9). The numbers are much higher today. These apps perform thousands of different functions, in competition with countless different potential substitutes—including other apps but often also other software (like desktop applications), physical devices such as calculators, guitar tuners, or game systems, and numerous publications. That means that demand and supply elasticities would need to be estimated in this case on a scale never before imagined, let alone undertaken. *See* Coutroulis, 44 Antitrust Bull. at 198 ("In indirect purchaser litigation, [estimating the relevant supply and demand elasticities] will be necessary for each relevant product and geographic market, at each level of the distribution chain."). Respondents, after all, seek to represent "[a]ll persons in the United States . . . who purchased an iPhone application or application license from Apple for use on an iPhone at any time from December 29, 2007 through the present." Pet. App. 57a (¶ 54) (emphasis omitted). They claim overcharges from each and every app sale, regardless of whether the app is a game like Minecraft or Fortnite, a business productivity app like Microsoft Word, a health app like Full Fitness

Workout, a music subscription app like Pandora, or a photo-editing app like Lightroom (to highlight just a few of the obvious distinctions).

In earlier, related litigation, Respondents took the position that this analysis could be done once—on the theory that the natural and competitive price for app distribution should be zero, and therefore the consumer overcharge on all apps is exactly equal to Apple's commission. That is wrong on multiple levels. Global distribution through a curated app store would never be free. It is costly to provide, indisputably valuable, and competing platforms such as Google Play have similar if not identical commission structures. But even assuming, however implausibly, that the competitive price for distribution services should be zero, that simply means that the amount of the initial overcharge to the developer, the direct purchaser, is the full commission, *e.g.*, 30 cents per app in the case of $0.99 apps, $2.10 per app in the case of $6.99 apps and so on. It still leaves open the question of how much of that alleged overcharge would be passed on to consumers. And that is when the differing supply and demand conditions (and other considerations) affecting the developers come into play. Developers facing intense competition and highly elastic demand would absorb most of the overcharge. Those with market power and inelastic demand would pass most of it to consumers. And it is senseless to approach this case as if Mojang, the developer of Minecraft (currently the best-selling paid app), would make the same pass-through decision as Rockstar Games would for Grand Theft Auto, Fifth Star Labs LLC would for Sky Guide, and the *New York Times* would for content subscriptions. The unavoidable reality is that the many thousands of

developers affected would each solve for their competition, their supply and demand conditions, their costs, their business model options, and their risk tolerance—and their pass-through and pricing decisions would be as unique as fingerprints.

Developers would also make different decisions about their fundamental monetization strategy for a given app. They could, for example, shift away from up-front payments (*e.g.*, $3.99 for the app) to free apps with later in-app purchase opportunities, as to which there may be less elastic demand. Finally, it cannot be forgotten that each consumer buys a unique set of apps—the ones they choose to buy—implicating a unique set of developer pass-through decisions that would need to be reflected in any damages estimates. The complications are endless, making the Ninth Circuit's refusal even to acknowledge the pass-through issues all the more troubling.

In *UtiliCorp*, this Court adopted a zero-tolerance approach to pass-through damages. 497 U.S. at 208-12.[12] That is the right approach. The daunting pass-

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[12] The exceptions to *Illinois Brick* for cost-plus contracts, 431 U.S. at 736, 745, and where the intermediary between the plaintiff and defendant is controlled by the defendant, *e.g.*, *Jewish Hosp. Ass'n v. Stewart Mech. Enters., Inc.*, 628 F.2d 971, 975 (6th Cir. 1980), *cert. denied*, 450 U.S. 966 (1981), are situations in which there is no need to calculate a pass through. *UtiliCorp* addressed the cost-plus contract exception, holding that it would apply "only when, by hypothesis, the direct purchaser will bear no portion of the overcharge and otherwise suffer no injury." 497 U.S. at 218. And the control exception recognized, to date, only in the lower courts, applies only when there is such unity between the first and second seller that there effectively has been only one sale. *Jewish Hosp. Ass'n*, 628 F.2d at 975.

through issues presented here make for an easy case, plainly barred by *Illinois Brick*.

C. If Respondents Were Allowed To Seek Damages, Apple Would Face Duplicative Damages Claims

Next to the challenges of apportioning overcharges and calculating pass-through rates, the most important consideration in an *Illinois Brick* analysis is the potential for duplicative recoveries. This Court and the lower courts have been emphatic about this. *Illinois Brick* refused "to 'open the door to duplicative recoveries' under § 4," 431 U.S. at 731 (citation omitted); *UtiliCorp* reaffirmed that principle, 497 U.S. at 212-13; and lower court cases accepting and applying this principle are legion. *See, e.g.*, *Lakeland Reg'l Med. Ctr., Inc. v. Astellas US, LLC*, 763 F.3d 1280, 1285 (11th Cir. 2014) (noting a purpose of the rule is to "eliminate[] the possibility that direct and indirect purchasers could seek duplicative recoveries against the antitrust violator"); *Merican, Inc. v. Caterpillar Tractor Co.*, 713 F.2d 958, 967-68 (3d Cir. 1983) ("[T]he scope of *Illinois Brick*'s rule barring treble damage actions by certain persons must be determined in each case by examining whether allowing those persons to sue could create the possibility of duplicative recovery . . . ."), *cert. denied*, 465 U.S. 1024 (1984); *Adams v. Pan Am. World Airways, Inc.*, 828 F.2d 24, 30 (D.C. Cir. 1987) (recognizing that under *Illinois Brick* "multiple recovery should be avoided" and thus "allowance of indirect purchaser suits would compel apportionment of the recovery"), *cert. denied*, 485 U.S. 961 (1988); *Simon v. KeySpan Corp.*, 694 F.3d 196, 204 (2d Cir. 2012) (reasoning that in addition to a retail purchaser, "[t]he fact that [an electric utility] would

be a proper plaintiff to sue [a wholesale electricity producer] for the same conduct implicates *Illinois Brick*'s concerns about duplicative recovery"), *cert. denied*, 569 U.S. 947 (2013); *Cohen v. Gen. Motors Corp. (In re New Motor Vehicles Canadian Exp. Antitrust Litig.)*, 533 F.3d 1, 5 (1st Cir. 2008) (holding that permitting car lessees to sue car manufacturers for conspiring to prevent lower priced Canadian cars from entering the U.S. market would "risk duplicative recovery" as car dealers could also "initiat[e] their own suit").

There is no doubt that the risk of duplicative recoveries exists here—the Ninth Circuit itself said so and, inexplicably, held that it did not matter. The threat comes from the fact that iOS developers who pay the allegedly monopolistic commission could sue. Apple urged the Ninth Circuit to account for this possibility, drawing this response:

> We do not address the question whether Apple sells distribution services to app developers within the meaning of *Illinois Brick*. If it did, this would necessarily imply that the developers, as direct purchasers of those services, could bring an antitrust suit against Apple. But whether app developers are direct purchasers of distribution services from Apple in the sense of *Illinois Brick* makes no difference to our analysis in the case now before us.

Pet. App. 20a.

This is error. The prospect of duplicative recovery cannot "make[] no difference." In addition to saying, repeatedly, that it does, this Court has stuck to that

position even though it means that some deserving plaintiffs are uncompensated. *See Illinois Brick*, 431 U.S. at 731 n.11 ("[P]roponents of [indirect purchaser actions] ultimately fall back on the argument that it is better for the defendant to pay sixfold or more damages than for an injured party to go uncompensated. . . . We do not find this risk acceptable."). Determining the "direct purchaser" is therefore necessarily an endeavor to find *one* appropriate plaintiff group among the categories of possible plaintiffs, thus *eliminating* any potential risk of duplicative recoveries. Here, that is plainly the iOS developers—the direct purchasers and "consumers" of the allegedly monopolized distribution services, and the group that meets all of the relevant "efficient enforcer" criteria.[13] The Ninth Circuit's express

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[13] Respondents suggest that developers may be afraid to sue Apple, but this is both irrelevant and highly unlikely. This Court has never recognized an exception to *Illinois Brick* that would invite courts to speculate about whether the actual direct purchaser was likely to sue. To the contrary, this Court has consistently rejected arguments that *Illinois Brick* dampens antitrust enforcement by putting the cause of action in the wrong hands. *See Illinois Brick*, 431 U.S. at 746; *UtiliCorp*, 497 U.S. at 214 (rejecting the argument that the direct purchasing utilities "lack the incentive to prosecute § 4 cases").

In all events, as Landes & Posner have observed, "the idea that purchasers are bashful about suing their suppliers is today unrealistic, almost quaint. Firms now bring antitrust suits at the drop of a hat—and are subject to severe criticism, and potentially to shareholders' derivative actions, if they forgo an opportunity to bring a meritorious suit." 46 U. Chi. L. Rev. at 614. It is also significant that among the tens of thousands of firms and individuals that have become registered iOS developers, and thus subject to the allegedly monopolistic behavior, are industry giants like Google, Microsoft, Hewlett-

indifference to how this suit duplicates and conflicts with potential developer claims is its ultimate repudiation of this Court's doctrine.

Respondents argue that duplicative recoveries are not a concern in this case because were iOS developers to sue, both the consumer and developer plaintiff groups would be fighting for "a piece of the same 30% pie." BIO 12. What this apparently means is that both consumers and developers would agree that the entire 30% commission is an overcharge, and then they would agree that the sum of their damages claim would not exceed the full commission. But why should anyone expect that to happen? The duplicative recovery concern is based on the rational assumption that different plaintiff groups will "assert conflicting claims to a common fund—the amount of the alleged overcharge—by contending that the entire overcharge was absorbed at that particular level in the chain." *Illinois Brick*, 431 U.S. at 737. There is no mechanism for forcing plaintiffs groups to agree on anything, let alone on constraining their claims so as to avoid duplicative recoveries. And in all events, *Illinois Brick* specifically addressed the argument that through "procedural devices" courts might constrain duplicative recoveries—and rejected it because of "the complexity thereby introduced into treble-damages proceeding." *Id.* at 731 n.11.

Packard, and Electronic Arts, as well as companies whose entire livelihood comes from selling, or creating relationships through, mobile apps, *e.g.*, companies like Rovio (Angry Birds), King Games (Candy Crush Saga), and so on. It is implausible that no one in this wide range of sophisticated companies has the ability and wherewithal to sue Apple, if they truly felt wronged.

The obvious and acknowledged threat of duplicative recoveries in this case bars Respondents' damages claims.

II. PURCHASING APPS THROUGH THE APP STORE DOES NOT MAKE CONSUMERS DIRECT PURCHASERS OF APP DISTRIBUTION SERVICES

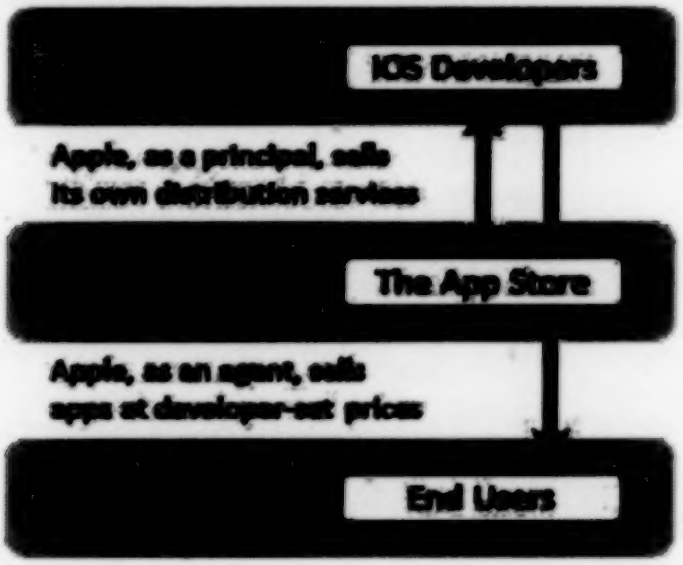
Respondents' case ignores pass-through and duplicative recovery concerns. Instead, it begins and ends with their allegation that Apple distributes apps "directly" to consumers via the App Store. Those were the only facts that mattered to the Ninth Circuit as well. *See* Pet. App. 21a ("Apple is a distributor of the iPhone apps, selling them directly to purchasers through its App Store. Because Apple is a distributor, Plaintiffs have standing under *Illinois Brick* . . . .").

But antitrust analysis is never that formalistic, let alone simplistic. This Court has been "unable to perceive significant social gain from channeling transactions into one form or another." *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58 n.29 (1977); *id.* at 58-59 (overruling *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), because of its excessive reliance on form). It has preferred instead to focus on "actual market realities." *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 466-67 (1992). And of course, the market realities that matter are those germane to the legal issue presented, in this case about *Illinois Brick*. Formalistic distinctions unrelated to the issue presented are the least important things of all.

From that perspective—considering Respondents' theory of antitrust injury and what it implies for *Illinois Brick*—the "actual market realities" that

matter are that consumers do not purchase the allegedly monopolized service from Apple, only developers do; and while consumers do purchase *apps* from Apple (acting as the developers' sales agent) app prices are set *by developers alone*.

App stores "are basically platforms connecting app users (smartphone owners) and app developers."[14] They are "two-sided" platforms, where a platform operator, such as Apple, "offers different products or services to two different groups who both depend on the platform to intermediate between them." *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2280 (2018). It is useful to return to the graphic introduced earlier so that all of the direct relationships are clear:



[14] Néstor Duch-Brown, The Competitive Landscape of Online Platforms 14, European Comm'n, Joint Research Centre Digital Economy Working Paper (2017), https://ec.europa.eu/jrc/sites/jrcsh/files/jrc106299.pdf.

Respondents are in the Consumer Tier, the end-user side of the platform. Apple does various things that benefit consumers directly, for example hosting the App Store, maintaining account files, and processing and fulfilling app purchases. But in this case, the alleged anticompetitive activity is *on the other side of the platform*, in connection with Apple's role as a provider of *distribution services* to iOS developers (the red arrow above). Apple is accused of scheming "to control and derive supracompetitive profits from the distribution of iPhone apps worldwide" and of "corner[ing] 100% of the worldwide distribution market for iPhone applications." Pet. App. 41a (¶ 3). The 30% commission "for any non-free app sold in the App Store" is allegedly the fruit of Apple's monopolization. *Id.* at 51a-52a (¶ 40).

The relevant question, then, is who purchases distribution services, the allegedly monopolized service; not who purchases apps. Developers are the ones who purchase distribution, not consumers. The commission structure that Respondents challenge is established by contracts between Apple and developers, in which (Respondents allege) the developers "g[i]ve Apple the exclusive worldwide right to distribute those apps thro gh the Apple's App Store," BIO 4, and agree to pay Apple 30% of their sales proceeds. Pet. App. 52a (¶ 41).[15] Therefore,

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[15] In the operative complaint, Respondents get a number of details about Apple's policies wrong. For example, Respondents ascribe the developers' obligations to the "software development kit" that Apple released in March 2008. Pet. App. 51a (¶ 38). The obligations were in fact contained in the then-named iPhone Developer Program License Agreement (copies of which are widely available on the internet), and are now found in the Apple

while this Court's *Illinois Brick* doctrine is about much more than formalism, if one is looking, formalistically, to identify the "direct purchaser" of the monopolized service, it is without a doubt the developer. The developer is also the first person to bear the alleged overcharge on the allegedly monopolized service, and by that definition also the "direct purchaser." *See* U.S. Invitation Br. 18 ("In *Illinois Brick* and *UtiliCorp*, the Court used the term 'direct purchaser' to describe a party that bears an antitrust violator's unlawful overcharge in the first instance . . . .").

Of course, consumers also transact with the App Store: on the consumer-facing side of the platform, Apple acts as the developers' selling agent, as is typical in electronic commerce.[16] This makes Apple a "seller" in the same transactional sense that a travel agent "sells" airline tickets (for airlines). But that is not the end of the *Illinois Brick* analysis. One needs to go on and ask the exact questions the district court asked here: who is setting the price, and what does that mean for the plaintiffs' damages theory? Otherwise one hasn't even started the *Illinois Brick* analysis, which is about pricing, not logistics. And that is especially important in the case of an agency-

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Developer Program License Agreement. These errors do not materially affect the *Illinois Brick* issues. For present purposes Apple accepts Respondents' contentions that "Apple contracted with app developers, who agreed . . . to supply their [iPhone-specific] apps only to Apple for distribution solely through the App Store." BIO 4.

[16] *See* Vibhanshu Abhishek et al., *Agency Selling or Reselling? Channel Structures in Electronic Retailing*, 62 Mgmt. Sci. 2259, 2259-60, 2275 (2016).

based platform like the App Store, since the "key distinction between the reselling and agency selling formats" is that "in agency selling the retail prices are decided by the manufacturer, whereas in reselling they are decided by the e-tailer." Abhishek et al., 62 Mgmt. Sci. at 2259-60.[17] This means that while consumers such as Respondents may be *dealing* with Apple, they are buying apps at prices set solely by iOS developers. That is what matters to *Illinois Brick*.

The Eighth Circuit understood this in *Campos*, a monopolization case arising in the ticketing industry. *Campos v. Ticketmaster Corp.*, 140 F.3d 1166, 1168-71 (8th Cir. 1998), *cert. denied*, 525 U.S. 1102 (1999). Buyers of concert tickets sued Ticketmaster for allegedly monopolizing the market for ticket distribution services for large-scale popular music events. *Id.* at 1168-69. The ticket buyers sought to recover damages based on allegedly supracompetitive ticket service fees they paid "directly to Ticketmaster." *Id.* at 1171. The allegedly monopolized services, however, were purchased by concert venues, not plaintiffs. *Id.* Ticketmaster was transacting business with the plaintiffs because (having allegedly vanquished its rivals) it had entered

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[17] Indeed, if anything, the presence of a sales agent like Apple ought to be a red flag, since in the law generally sales agents "do not purchase or take possession of the manufacturers' goods, bear any financial risk for these goods, or possess any discretion as to the pricing of the goods." *Fuchs Sugars & Syrups, Inc. v. Amstar Corp.*, 602 F.2d 1025, 1028 (2d Cir.), *cert. denied*, 444 U.S. 917 (1979). This Court has previously recognized that sales agents and their principals are not independent economic actors when it comes to pricing. *See United States v. Gen. Elec. Co.*, 272 U.S. 476, 482 (1926) (patent holder did not fix prices with its sales agents, who by contract were "not to control or attempt to control prices" at which the patented goods were sold).

into venue agreements whereby the venues granted to Ticketmaster a right "to sell [tickets] *as Principal's agent*." U.S. & FTC Br. 9, *Campos v. Ticketmaster Corp.*, 525 U.S. 1102 (1999) (No. 98-127), https://www.justice.gov/sites/default/files/osg/briefs/1998/01/01/98-0127.ami.pet.inv.pdf ("*Campos* U.S. & FTC Br.") (alteration in original) (citation omitted).

The ticket buyers argued they were direct purchasers, literally and for purposes of *Illinois Brick*. The Eighth Circuit, however, held that because the allegedly excessive ticketing fees were a product of and reflected Ticketmaster's upstream monopoly power over concert venues—the only purchasers of the monopolized service—the directly injured parties were the venues rather than the consumers. Ticket buyers were indirect purchasers because, while they may indeed have paid "some portion of the monopoly overcharge," they did so "only because the previous purchaser [*i.e.*, the venue] was unable to avoid that overcharge." *Campos*, 140 F.3d at 1170.

When asked by this Court for its views, the United States opined that the Eighth Circuit's holding was correct:

> [T]he facts that Ticketmaster collects the money from the ticket buyer, and that part of the total sum that the ticket buyer pays to Ticketmaster is denominated as a service fee, do not alone establish that the ticket buyer is purchasing any service directly from Ticketmaster. To the contrary, according to the express allegations of the complaint, Ticketmaster acts as the venue's agent when it sells tickets. And

> the designated service charge that Ticketmaster collects does not represent its compensation, which is fixed by contract with the venue, usually at a different amount.
>
> It would be contrary to the rationale of *Illinois Brick* to allow ticket buyers to recover damages attributable to Ticketmaster's alleged monopoly overcharges merely because of the particular nature of the input that Ticketmaster supplies to the venues (*i.e.*, Ticketmaster's services as the venues' agent in dealing with ticket buyers).

Campos U.S. & FTC Br. 11-12 (citations omitted).

Of course, the Ninth Circuit disagreed with *Campos*—but not for any reason found in this Court's decisions. It regarded the fact that developers set their own app prices as one of the things that "make[] no difference." Pet. App. 20a. But pricing and the complexity and uncertainty of estimating how pricing decisions pass through overcharges make all the difference in an *Illinois Brick* analysis. So if one wishes to ground an *Illinois Brick* analysis, appropriately, in exactly who is selling what to whom and who is deciding whether to pass-through an overcharge to the plaintiffs, the "actual market realities" that matter to this case—a case about allegedly monopolized *app distribution services*—are clear: Apple sells app distribution services to developers; developers set app prices, passing through some indeterminate amount of Apple's commission. In that setting, consumer app

purchasers could only seek damages based on a pass-through theory of harm barred by *Illinois Brick*.

III. THE NINTH CIRCUIT'S FOCUS ON THE "FUNCTION" OF DISTRIBUTION IS INCONSISTENT WITH THIS COURT'S PRECEDENT AND UNWORKABLE

We turn finally to the Ninth Circuit's "functional" reinterpretation of the *Illinois Brick* doctrine—mindful that at the certiorari stage, Respondents made no effort to defend it. To the contrary, they claimed "the Ninth Circuit did not say or imply that its standing analysis began and ended with whether Apple functioned as a distributor." BIO 7. But that is exactly what the Ninth Circuit held, emphasizing the point by systematically holding that nothing else mattered. *See* Pet App. 17a. ("[T]he question is whether Apple is a manufacturer or producer, or whether it is a distributor .... [I]f Apple is a distributor from whom Plaintiffs purchased directly, Plaintiffs do have standing."); *id.* at 19a-21a (arguing that "[t]he key to the analysis is the function Apple serves," and dismissing the significance of other factors). This is wrong. In an *Illinois Brick* analysis, there is no reason to even ask who performs distribution "functions" like delivering goods.

As we have shown, the rationale of this Court's decisions in *Hanover Shoe*, *Illinois Brick*, and *UtiliCorp* is to ensure that courts and juries hearing federal antitrust cases never need to adjudicate pass-through issues, and to avoid the risk that conflicting apportionment arguments lead to duplicative recoveries. The Ninth Circuit's novel reformulation of the law substitutes "functions" that do not matter at all for everything that this Court has held matters most.

The contrast is stark. Under the Ninth Circuit's new rule, so long as a defendant "functions" as a "distributor" of goods to a plaintiff, that plaintiff is a "direct purchaser" from the defendant with standing to seek damages. The analysis is complete, and it does not matter (i) whether "Apple does [or does] not take ownership of the apps," (ii) whether Apple "mark[s]up" the price of apps or takes a "commission," or (iii) "who determines the ultimate price paid by the buyer of an iPhone app." Pet. App. 20a-21a. But these are exactly the considerations that bear on whether the plaintiff's theory of harm would require the trier of fact to resolve pass-through issues. They are the questions (or some of them) that bear on *how sellers set prices*, which is the "function" one needs to examine to determine whether earlier overcharges are being passed-through to later buyers. It is the uncertainty about what pricing decision the seller will make when faced with the higher costs due to the original overcharge that has consistently driven this Court's decisions. *See Hanover Shoe*, 392 U.S. at 493 (referring to "the nearly insuperable difficulty of demonstrating that the [middleman] could not or would not have raised his prices absent the overcharge"); *Illinois Brick*, 431 U.S. at 731-32 ("The principal basis for the decision in *Hanover Shoe* was the Court's perception of the uncertainties and difficulties in analyzing price and out-put decisions 'in the real economic world . . . .'" (citation omitted)); *UtiliCorp*, 497 U.S. at 208-210 (refusing to create an exception for regulated rates due to uncertainties of pass-through). That uncertainty is also the foundation for this Court's concerns about duplicative recovery, since different plaintiffs will predictably "assert conflicting claims" that in the aggregate

exceed true single damages. *Illinois Brick*, 431 U.S. at 737.

Distribution "functions" such as processing orders and delivering goods have nothing to do with these concerns, especially when the distributor is an agent without any price-setting role. In *Howard Hess Dental Laboratories Inc. v. Dentsply International, Inc.*, 424 F.3d 363, 373 (3d Cir. 2005), *cert. denied*, 547 U.S. 1163 (2006), the Third Circuit correctly stated that who delivers goods to whom "does not affect the economic substance of the transaction."[18] Prior to this case, the Ninth Circuit itself had correctly ruled that consumer claims about allegedly elevated "interchange fees" were barred by *Illinois Brick*, even though the defendant ATM owners distribute money directly to consumers. *ATM Fee*, 686 F.3d at 749-50.[19]

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[18] In *Dentsply*, various groups of dental labs sued a manufacturer of artificial teeth (Dentsply) for monopolization, even though Dentsply sells its product first to middle-man dealers, which then add a markup and resell the teeth to dental labs. 424 F.3d at 366. One group of labs argued that at least when Dentsply drop-shipped the teeth straight to the labs, the labs "were direct purchasers not subject to *Illinois Brick*." *Id.* at 372. The Third Circuit disagreed. *Id.* at 372-73.

[19] In *ATM Fee*, ATM cardholders complained that ATM owners and the banks that issued their ATM cards "engaged in horizontal price fixing," colluding to set a fee (the "interchange fee") that the card-issuing bank paid to the ATM owner. 686 F.3d at 745-46. The plaintiffs alleged that the card-issuing bank passed on that supra-competitive interchange fee when it charged another fee (the "foreign ATM fee") to cardholders when they used an ATM owned by another bank. *Id.* at 746. The Ninth Circuit held that plaintiffs have antitrust standing only if they are complaining about collusion that "sets the price directly paid, not a price latter [sic] passed-on as part of the price at issue." *Id.* at 752-53. "[I]n the context of *Illinois Brick*, fixing an

And the leading antitrust treatise urges antitrust courts to focus on economic substance rather than distribution, explaining: "When distribution chains are complex, making it difficult to identify who dealt directly and who indirectly, it is less important that the court formalistically identify a direct purchaser and more important that it adhere to the principles that the *Illinois Brick* rule reflects." 2A Phillip E. Areeda et al., *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 346j (3d ed. 2007).

The Ninth Circuit tried to justify its "functional" approach by pattern-matching this case to others in which "distributors" were held to be direct purchasers from "manufacturers," and end consumers were held to be direct purchasers from distributors or retailers. Of course those are common fact patterns; distributors that buy and resell goods often set prices, after all. The Ninth Circuit has nevertheless confused the legal standard with the particular factual setting to which this Court had occasion to apply that standard. There is not a word in *Hanover Shoe*, *Illinois Brick*, or *UtiliCorp* suggesting that this Court thought that the right way to approach an *Illinois Brick* issue is to force the facts into a manufacturer-distributor dichotomy. The focus on pass-through dynamics and the potential for duplicative recovery, on the other hand, is pervasive.

Finally, the Ninth Circuit's "distributor function" rule will consistently result in the wrong answer when the distributor is an agent rather than a price-setting reseller. The Ninth Circuit acknowledged that "[i]n the case before us, the price [of an App] is

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upstream cost [does] not equate to fixing the price paid by the plaintiffs." *Id.* at 754.

determined as a practical matter by the app developer." Pet. App. 21a. So there is no doubt that it meant to hold that distributor "functions" eclipse price-setting in resolving *Illinois Brick* issues concerning agents. Yet agency sales models the same as, or similar to, the App Store are increasingly prevalent in online ecommerce and facilitate many hundreds of billions of dollars in transactions annually. A few notable examples of this model are Google's Play (originally "Android") marketplace, Ticketmaster's and StubHub's ticket sites, eBay's hugely popular auction site, Sears Marketplace, Facebook's Marketplace, and travel-related sites generally. The sponsor of every one of these marketplaces performs numerous distributor "functions." StubHub sells and delivers tickets—as the agent of its customer (the ticket seller). Google will sell and deliver a copy of Angry Birds™—as the agent of the developer. Sears Marketplace sells and delivers all sorts of goods—as the agent of thousands of third parties.

Under the Ninth Circuit's decision, the distributor functions allow consumers to claim direct purchaser status, always—even for practices that in the first instance affect developers, content owners, or other upstream entities. All of the considerations that are critical under *Illinois Brick* and the direct purchaser doctrine—pricing dynamics; pass-through dynamics; and even a clear potential for duplicative lawsuits and double-recovery—are irrelevant. And this categorical error—getting an entire business model wrong—will not be the sole error caused by the Ninth Circuit's aberrant reasoning. If this Court adds "distributor fu ctions" to its traditional *Illinois Brick* criteria, there is no telling how many cases presenting serious

pass-through and duplicative recovery concerns would survive motions to dismiss and lead to the quagmire this Court sought to avoid.

The Ninth Circuit's decision throws into disarray principles that have long been settled, nationwide. Its "distributor function" analysis should be rejected as unwise and inconsistent with the pass-through and duplicative recovery rationales so clearly evident in this Court's decisions. The district court got this case right—asking the right questions, clarifying the right facts, and coming to the right conclusion. Respondents' damages claims necessarily depend on a pass-through theory of one kind or another, and undoubtedly duplicate and conflict with potential developer claims. They are barred by *Illinois Brick*.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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IN THE
Supreme Court of the United States

APPLE INC.,
Petitioner,

v.

ROBERT PEPPER, ET AL.,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

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QUESTION PRESENTED

Whether *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), which construes § 4 of the Clayton Act to exclude damages claims by "indirect purchasers" two or more steps away in a vertical supply chain from the alleged monopolist, bars owners of Apple-manufactured iPhones who purchased aftermarket software applications ("apps") from Apple through its App Store from recovering damages from Apple for monopolizing the market for such apps.

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INTRODUCTION

Respondents are Apple iPhone owners who purchased iPhone applications ("apps") from petitioner Apple through its App Store. Respondents cannot purchase apps through any other means, because Apple designs, builds, and ships iPhones with technological limitations that prevent owners from buying or obtaining apps anywhere else. As a result, no competitors exist. Apple's technologically enforced monopoly of the retail aftermarket for iPhone apps drives app prices higher than they would be in a competitive market. Respondents pay the monopoly prices for apps directly to Apple through its App Store. Those facts make respondents direct purchasers of iPhone apps who can sue Apple for damages under § 4 of the Clayton Act and the bright-line rule this Court adopted in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

Illinois Brick bars § 4 damages claims where a plaintiff sues a defendant two or more steps removed in a distribution chain, when the monopoly overcharge causes damage first to an intermediary and only then to the plaintiff. *See id.* at 737 (rule bars claims where goods flow "from direct purchasers to middlemen to ultimate consumers"). Here, respondents purchase apps directly from Apple through Apple's App Store and pay the overcharge directly to Apple. The developers that create the apps do not and cannot sell directly to iPhone owners. Through technological barriers and threats to void warranties, Apple prevents iPhone owners from purchasing apps through any channel other than Apple and the Apple App Store. Developers receive money for iPhone apps only from Apple and only after consumers make their purchases.

Apple's attempts to invoke *Illinois Brick* depart from the allegations of the complaint in two important

ways. Neither departure is appropriate on a motion to dismiss, and neither would make a legal difference even if valid. *First*, Apple contends that it has monopolized the market only for app-distribution services, not for apps themselves, and that it sells app-distribution services only to developers. But respondents properly alleged that Apple acts as a monopolist in selling apps to iPhone owners, which no one else can do. Further, even if this Court were to accept Apple's invitation to recharacterize the complaint as alleging a monopoly on distribution services rather than a monopoly on apps, it would not matter because Apple sells services to consumers as well.

Second, Apple contends that developers set app prices and that Apple is merely their agent in selling apps to iPhone owners. That is not true – Apple controls which developers can sell apps, which apps can be sold, and what prices developers can charge. It exercises that control by insisting that every paid app be priced in dollar increments at $0.99, $1.99, $2.99, and so forth. Even if the app developers functionally controlled their app pricing, that would not defeat respondents' cause of action. Respondents still deal directly with Apple, pay Apple for the apps, and sustain damages directly from Apple's monopoly power.

Contrary to Apple's claims, this case presents no risk of duplicative damages. If the developers that create software apps could seek antitrust damages from Apple, they would be "differently situated plaintiffs" seeking remedies for "different injuries in distinct markets." *Loeb Indus., Inc. v. Sumitomo Corp.*, 306 F.3d 469, 481 (7th Cir. 2002) (Wood, J.). As suppliers of apps – not purchasers – they would be suing Apple as a monopsonist rather than as a monopolist, and their claims presumably would rest on the

allegation that Apple's restraints cause them to earn lower profits (because of lower prices received, reduced sales, or both) than they could obtain in a market not dominated by a single retailer. So calculated, their antitrust damages could be negative or zero even though iPhone owners' damages were positive – showing that app developer damages are not "passed on" to respondents.

Finally, Apple's misapplication of *Illinois Brick* would undermine the purpose of that rule, which promotes the "vigorous enforcement" of § 4's treble-damages remedy. *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199, 214 (1990). This is not a case where the iPhone owners' suit would decrease the incentives of a more suitable group of private plaintiffs to act as enforcers – the iPhone owners are the best situated to seek damages from Apple because they have been directly damaged by its unique business model. Settled law recognizes them as appropriate plaintiffs.

STATEMENT

A. The iPhone, Apps, and the App Store

1. The iPhone is a groundbreaking product that has met with great commercial success. It combines attributes of a cellular phone, handheld computer, music player, video player, camera, and other devices. After purchasing an iPhone that Apple has manufactured and loaded with its proprietary iOS software, the iPhone's owner deploys the device's capabilities by using software applications ("apps") that are loaded onto the iPhone and enable it to do various things such as communicate with friends; view documents, pictures, and video; listen to music; shop for products and services; play games; and engage in a host of other activities. *See Riley v. California*, 134 S. Ct. 2473, 2490 (2014) ("[t]here are apps . . . for every conceivable

hobby or pastime"). A small number of apps are loaded onto the iPhone at the time of its initial purchase, but the vast majority must be obtained separately in later ("aftermarket") transactions – some for free, and others for payment.[1]

To purchase apps in the aftermarket, iPhone owners have only one option: they must go to Apple's App Store. From the iPhone owner's perspective, the App Store is itself an app on the iPhone that Apple created and maintains for the purpose of selling other apps. That digital storefront is backed by an administrative and support structure that includes employees who review apps and servers that store them, all managed and controlled by Apple. App. 51a (¶ 39). Apple actively manages the App Store's inventory, employing "editors" who "handpick" featured apps for promotion by Apple in the App Store and who offer "perspectives on what's new and next in the world of apps."[2] Apple at all times retains the "sole discretion" to decide what apps it will and will not sell through the App Store.[3]

After using the App Store to search or browse for apps, iPhone owners who decide to make a purchase then "buy [those] apps from the App Store" by paying

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[1] An "aftermarket" is generally defined as a "derivative market" for goods "that must be used for the proper functioning of some primary good" and that "are typically purchased in a later transaction than the purchase of the underlying primary good." IIB Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 564b, at 421 (4th ed. 2014) ("Areeda & Hovenkamp").

[2] Apple, *App Store*, https://www.apple.com/ios/app-store/ (last visited Sept. 24, 2018).

[3] Apple, *iPhone Developer Program License Agreement* § 3.2(f) (Jan. 22, 2010 version), https://www.eff.org/files/20100127_iphone_dev_agr.pdf (last visited Sept. 24, 2018) ("Apple Developer Terms"); *see also id.* § 6.2; *cf.* Pet. Br. 36 n.15 (copies of the Apple Developer Terms "are widely available on the internet").

Apple the app's list price using an "Apple ID" account, which is usually linked to a credit card for payment purposes.[4] After receiving payment, Apple permits the owner to download the app – that is, to copy the digital code that constitutes a selected app from Apple's server to the user's iPhone. Should customers need the app again, it remains available to them through the App Store; and consumers who encounter billing issues – for example, who see "an app charge that [they] don't recognize" or who want to "change[] or cancel" an in-app subscription – go directly to Apple. App Store Support Page.

Apple presents the App Store to iPhone owners as the sole way they can "buy, get, license, rent or subscribe to media, [apps], and other in-app services."[5] In order to access the App Store, iPhone owners must agree to the Apple Services Terms, which obligate them to pay charges to Apple for "Content" (including apps), waive certain remedies against Apple, agree to a standard end-user license agreement, allow Apple to modify the Apple Services Terms at any time, and agree to allow Apple to "modify, suspend, or discontinue . . . any . . . Content" – including, among other things, a user's access to any purchased apps – "with or without notice" and with no liability for doing so. Apple Services Terms § J. Among additional terms to which an owner must agree is a recitation by Apple

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[4] Apple, *Download apps and games using the App Store*, https://support.apple.com/en-us/HT204266 (last visited Sept. 24, 2018) ("App Store Support Page"); *see also* App. 52a (¶ 41).

[5] Apple, *Apple Media Services Terms and Conditions* § A, https://www.apple.com/legal/internet-services/itunes/us/terms.html (last visited Sept. 24, 2018) ("Apple Services Terms"). Other Services include Apple's "iTunes Store, . . . Apple Books, Apple Music, and Apple News." *Id.*

that "Apple acts as an agent for App Providers in providing the App Store and is not a party to the sales contract or user agreement between [the owner] and the App Provider." *Id.* § G. Yet the owner must simultaneously agree that Apple is a "third-party beneficiary of" the license agreement for the app "and may therefore enforce such agreement." *Id.*

2. Apple designs and programs its iPhone (through the iOS operating system) so that an iPhone owner can purchase aftermarket apps only through Apple's proprietary App Store. That restriction is enforced primarily through technological means: the iPhone's software "foreclose[s] iPhone consumers from buying software from any source other than Apple." App. 42a (¶ 7); *see* Pet. Br. 7 ("iPhones will only download" apps from the App Store). Apple also reinforces its restriction by threatening customers with adverse contractual consequences if they bypass Apple's technological barriers. An owner who successfully modifies an iPhone's software so as to install apps from non-Apple sources – often referred to as "jailbreaking" the phone – risks voiding the phone's warranty. *See* App. 3a.[6]

Apple's intentionally closed system prevents competition in the aftermarket for iPhone apps. iPhone owners who want to unlock the range of functions on their iPhone have no choice but to shop for apps in the App Store, which enables the App Store to collect

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[6] *See also* Kif Leswing, *Apple has strong words for anyone who wants to 'jailbreak' their iPhone to run unauthorized apps*, Bus. Insider (June 23, 2018) ("Apple also says that a jailbroken device can be denied service at Apple stores."), https://www.businessinsider.com/apple-jailbreak-iphone-warning2018-6; Apple Support, *Unauthorized modification of iOS can cause security vulnerabilities, instability, shortened battery life, and other issues*, https://support.apple.com/en-us/HT201954 (last visited Sept. 18, 2018).

a higher price per app than if Apple were forced to entice app seekers in a competitive market. *See* App. 52a-55a (¶¶ 41-43, 48-49).

3. Because consumers with iPhones can purchase apps only through Apple's App Store, developers wishing to sell apps to iPhone owners must reach customers by having Apple sell their apps through the App Store. For access to the App Store, developers pay Apple $99 per year. *See* App. 51a (¶ 38). In addition, every time Apple sells an app through the App Store, it collects the full price from the purchasing iPhone owner, keeps 30%, and pays the remaining 70% to the developer. *See* App. 52a (¶ 41).

Currently, Apple permits developers to select a retail price that Apple will charge owners for the developers' apps, but only from a limited range of prices. The price must end in "99 cents," Pet. Br. 9, meaning that developers are required to increase prices in one-dollar increments ($0.99, $1.99, $2.99, and so forth). As a practical matter, that allows only for very blunt price adjustments because "[t]he vast majority of [paid] apps are priced at 99 cents."[7] Thus, a developer wishing to set a price lower than the Apple-mandated minimum price point must give away the app for free; one wishing to price above that point must at least double the 99-cent price.

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[7] Tim Kridel, *Pricing Strategies for Your App*, Digital Innovation Gazette, https://www.digitalinnovationgazette.com/dollars-and-distribution/pricing-strategies-for-your-app/index.php (last visited Sept. 18, 2018); *see also* Tracy-Gene G. Durkin, *Another way to look at software protection*, 259 Managing Intell. Prop. 10 (May 2016) (as of June 2015, the average price of an app in the Apple App Store was $1.16), *available at* https://www.sternekessler.com/news-insights/publications/another-way-look-software-protection.

Moreover, app developers' limited pricing discretion is revocable. Apple's agreement with developers provides that the governing terms may change "at any time" and that failure to agree to updated terms will cause a developer's "use of the Apple Software and any services [to] be suspended or terminated by Apple." Apple Developer Terms § 4. Beyond that, Apple maintains control over apps it sells to device owners by reserving the right to "cease distribution" or "revoke the digital certificate" of any app – that is, remotely render the app unusable – "at any time" if Apple believes "such action is prudent." *Id.* § 8.

B. Procedural History

1. On December 29, 2011, respondents filed a complaint alleging that Apple had violated and continues to violate § 2 of the Sherman Act. The complaint was consolidated with others and amended several times. On September 5, 2013, respondents filed the operative version of the complaint, in which they seek to represent a class of iPhone owners who paid Apple for apps from December 2007 to the present. *See* App. 40a-64a.

Respondents allege that Apple conspired to, and successfully did, "monopolize the aftermarket for iPhone applications in order to control and derive supracompetitive profits." App. 41a (¶ 3); *see also, e.g.*, App. 44a (¶ 12) (describing "Apple's unlawful monopolization of the iPhone applications aftermarket"); App. 48a-49a (¶ 29) (similar). They define the relevant market as the "aftermarket for iPhone applications." App. 58a-59a (¶ 65).[8]

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[8] Apple asserts in its brief (at 5) that respondents "do not allege that Apple monopolized *apps*." *See also* U.S. Br. 9 (picking up the same theme and describing "the *app-distribution services* that Apple allegedly monopolized"). That characterization is incorrect. *See also infra* pp. 29-31.

Respondents further allege that, "as a result" of Apple's "monopolistic conduct," they "have been forced to pay supracompetitive prices to Apple." App. 55a (¶ 49); *see also* App. 42a (¶¶ 4, 7) (alleging that "Apple . . . charge[s] and collect[s] a supracompetitive 30% fee from iPhone consumers"); App. 54a-55a (¶ 48) (describing the lower prices that would prevail "[i]n a competitive environment"). In a competitive market, iPhone owners would be able to "choose between Apple's high-priced App Store and less costly alternatives." App. 55a (¶¶ 49-50); *see also* App. 61a (¶ 73) (respondents have been "deprived of lower cost alternatives for apps" and "subjected to a lower output and supply of apps").

In addition, respondents also allege that Apple obtained and sustains monopoly control over the aftermarket for apps through direct interactions with respondents that prevent them from buying apps from anyone else. Those interactions include Apple's "modifi[cation]" of the operating system iOS "to be a 'closed' system by installing 'security measures' or 'program locks' designed to prevent iPhone consumers from installing and running apps that were not sold or approved by Apple." App. 49a (¶ 30); *see also* App. 50a-51a (¶¶ 34, 36). Apple also threatens its iPhone customers that using any apps not sold by Apple would "nullify Apple's iPhone warranty." App. 50a (¶ 34); *see also* App. 51a-53a (¶¶ 36, 42-43).

Respondents seek both treble damages for their injuries caused by Apple's past violations of the federal antitrust laws and an injunction prohibiting Apple from "monopolizing or attempting to monopolize the iPhone applications aftermarket." App. 63a.

2. Apple moved to dismiss the operative complaint, and the district court granted the motion under

Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977). App. 23a-37a. The court held that the monopolization complaint did not fall within a Ninth Circuit exception to the *Illinois Brick* rule for "price fixing" and, further, that the complaint alleged only supracompetitive prices "passed-on to consumers by independent software developers." App. 36a-37a. The district court dismissed the complaint in its entirety. App. 37a.

3. A unanimous panel of the Ninth Circuit reversed. The panel first traced the history of the *Illinois Brick* rule, observing that every time this Court has applied that rule "the basic structure" of the transaction at issue has been "the same." App. 16a. "In all three cases, the consumer was an indirect purchaser" from the alleged violator "who sold or leased the product to the intermediary" in the supply chain. App. 16a-17a; *see Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968); *Illinois Brick Co. v. Illinois*, *supra*; *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199 (1990). Applying that "straightforward" rule, the panel concluded that respondents could recover damages from Apple because Apple "sell[s] [apps] directly to purchasers through its App Store." App. 18a, 21a.

The panel disagreed with *Campos v. Ticketmaster Corp.*, 140 F.3d 1166 (8th Cir. 1998). There, concertgoers who had no prior relationship with Ticketmaster "bought concert tickets directly from Ticketmaster," but the Eighth Circuit deemed them "indirect" purchasers and denied them the right to sue. App. 18a-19a. The *Ticketmaster* majority held that "[a]n indirect purchaser is one who bears some portion of a monopoly overcharge only by virtue of an antecedent transaction between the monopolist and another, independent purchaser." 140 F.3d at 1169. Agreeing with Judge Arnold's dissent in *Ticketmaster*, the

Ninth Circuit rejected that "antecedent transaction" test as having "no basis" in *Illinois Brick*. App. 19a.

The court held that Apple's direct sales to respondents were more important than Apple's "ownership of the apps" it was selling, "the formalities of payment or bookkeeping arrangements," or how the "ultimate" retail price is determined. App. 20a-21a. It also declined to address whether app developers also could bring antitrust claims. App. 20a. The panel instead found it dispositive that consumers and Apple occupy adjacent positions in the supply chain. *See id.*; *see also Illinois Brick*, 431 U.S. at 737 (claims barred where goods go "from direct purchasers to middlemen to ultimate consumers"). Drawing an analogy between Apple's App Store and the supply chain for tangible consumer goods – in which manufacturers sell to wholesalers, which sell to distributors, which sell to consumers – the panel reasoned that Apple occupies the position of the "distributor," selling manufactured apps "directly to purchasers." App. 21a. Those purchasers – the iPhone owners – accordingly have a cause of action against Apple for monopolizing the market and driving up prices.[9]

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[9] The Ninth Circuit did not reach respondents' alternative argument, *see* Resp. C.A. Br. 53-54, that their claims for injunctive relief would survive even if Apple prevailed under *Illinois Brick*.

SUMMARY OF ARGUMENT

I. Section 4 of the Clayton Act authorizes a private suit for damages by "any person . . . injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15(a). This Court has held that, as applied to purchasers of goods or services, that broad language authorizes suit only by direct purchasers – those who buy products or services directly from a monopolist or cartel. Indirect purchasers, who are two or more steps removed from the violator in a distribution chain, cannot sue even though they may suffer harm from the violation. In this case, respondents purchase apps directly from Apple through Apple's App Store; they claim that Apple violated the Sherman Act by monopolizing the retail market for apps; and they assert that Apple's unlawful conduct is responsible for the overcharges they have suffered. Accordingly, they can seek damages from Apple under the Clayton Act.

A.1. This Court has drawn a bright-line rule: those who purchase directly from an antitrust violator can seek damages, and those who purchase indirectly cannot. The first case in the trilogy that establishes that rule is *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968). *Hanover Shoe* involved a shoe manufacturer that sued a monopolist of shoemaking equipment. The monopolist argued that the manufacturer had no damages because it passed the cost of the equipment on to its customers – if the equipment had cost less, then shoes also would have cost less, and the plaintiff would have been no better off. This Court rejected the monopolist's "passing-on defense" as inconsistent with precedent and likely to overcomplicate the litigation of antitrust cases. It therefore held that the manufacturer could sue for the

full overcharge that resulted from the monopolist's anticompetitive practices.

2. The second case is *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), which gave the direct-purchaser rule its name. *Illinois Brick* was a price-fixing suit by Illinois against makers of concrete blocks. Illinois did not buy blocks directly, but paid for construction projects built by general contractors that hired masonry subcontractors that bought the (allegedly price-fixed) blocks. This Court refused to let Illinois recover damages for the price-fixing, deeming it too complex to determine how the price of the building projects had been affected by the increased price of the blocks and expressing concern that spreading damages over the entire distribution chain would decrease the incentive of plaintiffs to bring private antitrust actions.

3. The third and final direct-purchaser case from this Court is *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199 (1990), a price-fixing suit by Kansas against natural-gas suppliers. The suppliers sold to regulated utilities, which sold to consumers. Kansas (on behalf of the consumers) argued that they could sue the suppliers because the utilities, being regulated, passed along the entire cost increase. This Court rejected that argument and refused to make exceptions to the direct-purchaser rule on a case-by-case or even industry-by-industry basis. To do so, the Court explained, would sacrifice the benefits of clarity and administrability by turning every large antitrust case into a fact-intensive dispute about whether the economic reasons for the direct-purchaser rule were present or absent.

B.1. iPhone owners purchase apps directly from Apple and therefore can seek damages from Apple under the direct-purchaser rule. The complaint alleges

that Apple has monopolized the market for apps at the retail level. There is no intermediary between the iPhone owners and Apple. To the contrary, Apple has gone to great lengths to ensure that no one *but* Apple can sell apps to iPhone owners. And Apple even has conceded in other litigation (involving Apple Books, which for present purposes is materially identical to the App Store) that iPhone and other device owners are direct (not indirect) purchasers of content from Apple. Under the bright-line rule established by *Hanover Shoe*, *Illinois Brick*, and *Utilicorp*, those facts answer the question presented.

2. Apple cannot avoid that conclusion by arguing that it monopolizes app-distribution services, not apps. The monopoly alleged in the complaint is a monopoly on apps, and respondents – as plaintiffs – are the masters of the complaint. Further, even if the complaint alleged a monopoly on distribution services (which it does not), Apple provides distribution services directly to iPhone owners, and so iPhone owners still could sue Apple for damages.

Apple also cannot prevail by arguing that it sells apps only as an agent for the developers. Agency is about control, and the complaint properly alleges that Apple (not the developers) controls all aspects of the sale of apps through the App Store, including the prices at and terms on which apps are sold. Apple's purported agency status stems solely from language that it wrote and imposed as a mandatory condition on use of the App Store by iPhone owners or app developers. A monopolist cannot use its market power to make all other market participants sign admissions that it is an agent and then use the "agency" label to avoid a remedy for its anticompetitive conduct.

Similarly, Apple's contention that app developers have discretion to set the prices charged for their apps does not shield Apple from a claim for damages. Apple both has and exercises control over the prices that developers set, most conspicuously through its policy of requiring that all prices in the App Store must "end in 99 cents." That 99-cent price rule both impedes price competition in the market and, more broadly, illustrates that developers have only limited influence over the prices consumers pay Apple. Apple retains the contractual right to change unilaterally and at any time the terms of its agreements with iPhone owners and app developers; it could decide tomorrow that it wants to set every price in the App Store, and no other market participant could do anything in response except for ceasing to purchase or supply iPhone apps.

Apple also cannot prevail by relying on *Campos v. Ticketmaster Corp.*, 140 F.3d 1166 (8th Cir. 1998). That case was an action by concertgoers who claimed that Ticketmaster had monopolized the market for ticket-distribution services. The Eighth Circuit held that, because Ticketmaster's ability to charge supra-competitive prices stemmed from an "antecedent transaction" with concert venues rather than a pre-existing relationship between Ticketmaster and the concertgoers, the venues rather than the concertgoers were the direct purchasers of Ticketmaster's services. That antecedent-transaction test cannot be squared with this Court's direct-purchaser rule. And, even taken at face value, that test would make iPhone owners (not app developers) the direct purchasers here, because an "antecedent transaction" between iPhone owners and Apple – which blocks any other distribution channel – creates Apple's market power.

II. The considerations that led this Court to adopt the bright-line *Illinois Brick* rule fully support the result the court of appeals reached below.

A.1. The iPhone owners' action does not seek damages that would duplicate or overlap with any damages that might be sought by app developers, if such a suit ever were or could be brought. Despite Apple's self-protective characterization of the transaction in its contracts, a developer would be suing Apple as a supplier of apps to the Apple App Store, not as a purchaser of app-distribution services; its claim presumably would be that Apple's restrictions on the sale of apps to iPhone owners deprive the developer of profits it otherwise could earn as a supplier on an open market. Apple has made itself the only retailer of iPhone apps; the developer's action would be equivalent to a suit by a wholesaler arguing that a retailer has pushed down wholesale prices through the exercise of monopsony (not monopoly) power. Accordingly, the developer's damages would be measured by the amount for which it could have sold its apps in a competitive market, or by the increased sales it could have made at the same prices without Apple's supracompetitive markup. It thus would be seeking a fundamentally different recovery from the iPhone owners, whose damages are measured by the "but-for" retail price of apps in a competitive market. Those two measures are not the same. iPhone owners may well suffer damages even though app developers suffer none or even benefit from the limits Apple imposes on price competition.

2. The iPhone owners' action does not threaten unduly complex damage calculations, as might result from an attempt to allocate damages among different levels of a supply chain. Calculating the owners'

damages from Apple's alleged antitrust violations is no more (and possibly less) complex than calculating an app developer's damages. That is because the developer's damages case would require estimating not only the amount the developer would have received on each sale, but also the amounts it would have received on lost sales it would have made but for Apple's conduct.

B.1. The federal policy favoring private enforcement of antitrust actions – which this Court has stressed as a significant reason for the direct-purchaser rule – favors recognizing the iPhone owners' cause of action. The developers may not even be able, and certainly are not likely, ever to sue Apple under antitrust law. Nor is there any risk of diluting incentives for a private damages action: because iPhone owners deal directly with Apple and suffer the most direct injuries from its conduct, they are the best positioned to seek a monetary remedy.

2. Affirmance here would not call into question cases holding that, when an intermediate seller-agent is completely controlled by its principal so that it is genuinely a mere conduit for sales, its upstream principal is liable to the downstream purchaser for damages. In such a case, however, the upstream principal must at least have an unconstrained ability to set prices and terms. In that circumstance, if the upstream principal bears an input cost that is elevated as the result of an antitrust violation, there may be a dispute about whether and to what extent the principal has passed through that cost in setting the retail price. Apple's arrangement does not meet that description: Apple deprives developers of most pricing discretion, and it is meaningless to ask about pass-through of a cost that the developers never incur.

ARGUMENT

I. iPHONE OWNERS CAN SEEK DAMAGES BECAUSE THEY PURCHASE APPS DIRECTLY FROM APPLE

Section 4 of the Clayton Act permits "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" to sue the violator in district court and to recover treble damages and attorney's fees. 15 U.S.C. § 15(a). As this Court has observed, that statutory text "is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 472 (1982).

This Court has held, however, that § 4 is not "as broad as its words suggest." *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 529-30 (1983). Instead, the Court has created rules of "antitrust standing" that "determin[e] whether [a particular] plaintiff is a proper party to bring a private antitrust action." *Id.* at 535 n.31. This Court has since clarified that statutory standing is better described as a matter of "whether [a plaintiff] falls within the class of plaintiffs whom Congress has authorized to sue" – or, "[i]n other words, . . . whether [the plaintiff] has a cause of action under the statute." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 & n.4 (2014).

At issue in this case is the holding of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), which establishes that the plaintiff who purchases a good or service directly from an antitrust violator – "the overcharged direct purchaser, and not others in the chain of manufacture or distribution" – "is the party 'injured in his business or property' within the meaning of" § 4 of

the Clayton Act. *Id.* at 729. Here, respondents have properly alleged that Apple is a monopolist that sells apps directly to (and imposes an overcharge directly on) respondents. Based on those allegations, respondents can seek damages from Apple. The case can and should be resolved as simply as that.

A. Plaintiffs Who Purchase Directly From An Antitrust Violator Can Seek Damages From That Violator

1. The rule of *Illinois Brick* traces back to *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968). There, in a suit by a shoe manufacturer (Hanover) against an allegedly monopolistic lessor of shoe manufacturing equipment (United), the Court held that United could not defend the claim by asserting a "passing-on defense" – that is, by contending that Hanover was undamaged (or less damaged) because it recovered any unlawful overcharge by passing that charge on to its own customers. *Id.* at 494. The Court instead permitted Hanover to sue for "the full amount of the overcharge," without any reduction for any amount passed on. *Illinois Brick*, 431 U.S. at 730; *see Hanover Shoe*, 392 U.S. at 489 ("[T]he buyer is equally entitled to damages if he raises the price for his own product.").

The *Hanover Shoe* Court gave three reasons for permitting Hanover to recover the entire overcharge on its direct purchases from the antitrust violator. One reason sounded in precedent, and two in policy. The precedential reason was that, dating back at least to *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390 (1906) (Holmes, J.), "[a] person whose property is diminished by a payment of money wrongfully induced is injured in his property" within the meaning of the antitrust laws. *Id.* at 396, *quoted*

in Hanover Shoe, 392 U.S. at 490. In *Chattanooga Foundry* and other cases, the Court located the rule that "the possibility that plaintiffs ha[ve] recouped . . . overcharges from their customers [i]s . . . irrelevant in assessing damages." *Hanover Shoe*, 392 U.S. at 490; *see also id.* at 490 n.8 ("'The general tendency of the law, in regard to damages at least, is not to go beyond the first step.'") (quoting *Southern Pac. Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533 (1918)).

The policy reasons given for rejecting United's passing-on defense in *Hanover Shoe* included a problem of trial proof and a problem of incentives. The trial-proof problem was that, because of the "wide range of factors [that] influence a company's pricing policies," the "task" of proving that the plaintiff had passed on a specific, quantifiable part of the defendant's overcharge would, the Court believed, "normally prove insurmountable." *Id.* at 492, 493. Yet defendants' attempts to do so would "often require additional long and complicated proceedings involving massive evidence and complicated theories." *Id.* at 493. The incentive problem was that, if plaintiffs were required to allocate their damages among everyone who paid any part of an overcharge at any point in the stream of commerce, there would be too little incentive for anyone to sue, so that "those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality." *Id.* at 494.

To avoid those consequences, the Court adhered to the straightforward approach to damages applied in *Chattanooga Foundry*. Under that approach, "Hanover proved injury and the amount of its damages for the purposes of its treble-damage suit when it proved that United had overcharged it during the damage period and showed the amount of the overcharge." *Id.*

United was not permitted to reduce or eliminate Hanover's damages by arguing that in the absence of United's overcharge Hanover would have "charged less" for shoes and therefore "made no more profit." *Id.* at 487-88.

2. *Illinois Brick* itself was a suit by the State of Illinois and other government entities against manufacturers of concrete blocks. The manufacturers sold the blocks to masonry contractors, which sold the blocks (as part of masonry projects) to general contractors, which sold the blocks (as part of completed construction projects) to Illinois and other customers. 431 U.S. at 726. Illinois alleged that the manufacturers had conspired to fix prices for concrete blocks and that the resulting overcharge was passed along the supply chain from the masons to the general contractors to, eventually, their customers. *Id.* at 726-27, 735. The manufacturers argued that, under *Hanover Shoe*, the action for the full overcharge belonged to the masons (the direct purchasers of the price-fixed product) and indirect purchasers such as Illinois could not recover.

This Court agreed. It first held that *Hanover Shoe* should apply "equally to plaintiffs and defendants – that an indirect purchaser should not be allowed to use a pass-on theory to recover damages from a defendant unless the defendant would be allowed to use a pass-on defense in a suit by a direct purchaser." *Id.* at 729. In support of that approach, the Court reasoned that treating plaintiffs and defendants asymmetrically would create a "serious risk of multiple liability for defendants," with "overlapping recoveries certain to result," *id.* at 730-31; that indirect-purchaser suits would create the same "evidentiary complexities and uncertainties" that the *Hanover Shoe* Court had sought to avoid, *id.* at 731-33; and that

"the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers," *id.* at 733-35.

The Court then rejected Illinois' request to limit or overrule *Hanover Shoe* in order to open the way for indirect-purchaser suits. *Id.* at 736-38. In addition to concerns of *stare decisis*, *id.*, the Court feared that including indirect purchasers in antitrust cases would lead to "massive multiparty litigations" and that "the attempt to trace the effect of the overcharge through each step in the distribution chain" would impede "the effective enforcement of the antitrust laws." *Id.* at 740-41; *see also id.* at 732-33 (highlighting the difficulty of "demonstrati[ng] . . . how much of the overcharge was passed on . . . at each point at which the price-fixed goods changed hands"). In *Illinois Brick* itself, that inquiry would have required estimating successively the overcharges both to the masons and then to the general contractors before determining Illinois' own damages. Nor did the Court wish to engage in "carv[ing] out exceptions to the *Hanover Shoe* rule for particular types of markets" in which the difficulties of proof might be easier. *Id.* at 744-45. To avoid those difficulties, and to further "the longstanding policy of encouraging vigorous private enforcement of the antitrust laws," the Court adhered to *Hanover Shoe*'s rule "elevating direct purchasers to a preferred position as private attorneys general." *Id.* at 745-47.

3. This Court returned to the *Illinois Brick* rule in *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199 (1990), an action by the State of Kansas alleging that suppliers of natural gas had conspired to fix the price of their product. The suppliers had sold the gas to utility companies, which in turn sold it to consumers

(represented by Kansas as *parens patriae*). The suppliers contended that the consumers (like Illinois in *Illinois Brick*) were only indirect purchasers of natural gas and that the action for the entire overcharge belonged exclusively to the utilities. Kansas responded that indirect-purchaser suits should be permitted "in cases involving regulated public utilities that pass on 100 percent of their costs to their customers," because the "concerns in *Hanover Shoe* and *Illinois Brick* about the difficulties of apportionment, the risk of multiple recovery, and the diminution of incentives for private antitrust enforcement would not exist in such cases." *Id.* at 208. The Court refused to make an "exception," *id.* at 216-17, for public-utility cases.

The Court observed that public-utility regulation did not wholly eliminate the concerns that had motivated the holdings of *Hanover Shoe* and *Illinois Brick* – even under a rate-setting scheme, there still would be problems of apportionment, risks of multiple recovery, and a reduced incentive for the utilities themselves to sue. *See id.* at 208-16. More generally, however, the *Utilicorp* Court reaffirmed its refusal in *Illinois Brick* to make exceptions to the direct-purchaser rule based on economic factors. *See id.* at 217 ("[E]ven assuming that any economic assumptions underlying the *Illinois Brick* rule might be disproved in a specific case, we think it an unwarranted and counterproductive exercise to litigate a series of exceptions.").

Taken together, *Hanover Shoe*, *Illinois Brick*, and *Utilicorp* create a bright-line direct-purchaser rule: those who purchase a product or a service directly from an antitrust violator can sue that violator for damages. *See Utilicorp*, 497 U.S. at 207. Those who are two or more steps from the violator in the "distribution

chain," *id.*, cannot. No further inquiry into the specifics of a case is required or even permitted.

B. iPhone Owners Purchase Apps Directly From Apple And Suffer Damages Caused By Apple

1. iPhone owners purchase apps directly from Apple and are directly harmed by its anticompetitive conduct

a. Under *Hanover Shoe*, *Illinois Brick*, and *Utilicorp*, iPhone owners can recover damages based on claims that they buy apps directly from Apple at unlawfully high prices. There is no allegation that high app prices are passed from Apple to consumers through a "middlem[a]n," *Illinois Brick*, 431 U.S. at 737, or that the owners bought "an illegally monopolized or cartelized product or service through the agency of a dealer, distributor, or some other independent reseller who was not a participant in the antitrust violation," Herbert Hovenkamp, *The Indirect-Purchaser Rule and Cost-Plus Sales*, 103 Harv. L. Rev. 1717, 1717 (1990); *see Loeb Indus., Inc. v. Sumitomo Corp.*, 306 F.3d 469, 482 (7th Cir. 2002) (Wood, J.) (summarizing the *Illinois Brick* "paradigm": "Party A, the antitrust violator, sells to Party B, and then Party C, a down-stream purchaser from B, seeks to recover the implicit overcharges that B passed on to C"). The absence of an intermediary here is dispositive.

The complaint alleges that Apple unlawfully monopolized the retail aftermarket for apps and that, within that market, it collects supracompetitive prices from respondents who buy apps from Apple directly. *See, e.g.*, App. 41a-42a (¶ 3: "Apple has engaged in an anticompetitive scheme to monopolize the aftermarket for iPhone applications in order to control and derive supracompetitive profits from the distribution of

iPhone apps worldwide"; ¶ 4: "Apple's App Store is the only store in the entire world . . . where the tens of millions of U.S.-based iPhone owners . . . can buy an iPhone app . . . . Consequently, iPhone consumers nationwide have paid [Apple] hundreds of millions of dollars more for iPhone apps than they would have paid in a competitive market."). Apple and the United States concede the same in their briefs. *See* Pet. Br. i (Apple "interacts with and delivers goods 'directly' to consumers"), 18 ("Apple sells and delivers apps to consumers"), 35 ("consumers . . . purchase *apps* from Apple"); *see also* U.S. Br. 24 ("respondents purchased apps directly from Apple"). Those concessions foreclose any claim of a middleman in the supply chain.

The root of *Illinois Brick* is proximate cause – the "tendency of the law . . . in regard to damages . . . not to go beyond the first step." *Southern Pac.*, 245 U.S. at 533, *quoted in Hanover Shoe*, 392 U.S. at 490 n.8. That principle is amply satisfied by allowing consumers to assert a cause of action against a monopolist that has set up a "Store" to obtain their business and that induces them to pay unlawfully high charges. *See* IIA Areeda & Hovenkamp ¶ 345, at 179 (4th ed. 2014) ("[C]onsumer standing to recover for an overcharge paid directly to an illegal cartel or monopoly is seldom doubted."). Indeed, Apple deliberately has placed itself as close as possible to iPhone owners at each step of the process that leads to the overcharge: Apple manufactures and sells the iPhone with the App Store already installed; the App Store is the only place where Apple allows the owner to purchase or obtain apps for the iPhone; an owner seeking to obtain an app visits the App Store and contacts Apple through the iPhone and pays Apple for the app through the App Store; and the delivery of the app, along

with any subsequent upgrades or modifications, occurs using Apple's servers. The iPhone owners are not "complain[ing] of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts," *Holmes v. Securities Inv'r Prot. Corp.*, 503 U.S. 258, 268-69 (1992), as were Illinois and Kansas in their unsuccessful cases.

Without that link to the traditional understanding of proximate cause, there is no justification for this Court to impose a limit on the otherwise plain and broad language of § 4 of the Clayton Act. As *Lexmark* explains, this Court's decisions involving "statutory standing" are ultimately exercises in "apply[ing] traditional principles of statutory construction." 572 U.S. at 128 & n.4. Here, Apple makes no attempt to ground its dramatically revised version of *Illinois Brick* in any "background principle[]" of law, *id.* at 129, that Congress would have recognized when it enacted the Clayton Act. Its brief is instead a thinly veiled invitation for the exercise of "independent policy judgment" to "limit a cause of action that Congress has created." *Id.* at 128. This Court should decline Apple's request.

b. iPhone owners' direct-purchaser relationship with Apple is further confirmed by the Second Circuit's – and Apple's own – treatment of the same issues. *See United States v. Apple, Inc.*, 791 F.3d 290 (2d Cir. 2015) ("*Apple eBooks*"). That case concerned the iBookstore (later renamed Apple Books), which Apple operated on terms materially indistinguishable from the App Store. Book publishers had "the freedom to set ebook prices in the iBookstore, and would keep 70% of each sale. The remaining 30% would go to Apple as a commission." *Id.* at 303. The *Apple eBooks* court correctly recognized that, even under what it

styled as "an agency relationship," Apple remained the "retailer." *Id.*

The Second Circuit, to be sure, was not applying the direct-purchaser rule. But, in the district court, Apple took the same position when the issue at stake *was* direct-purchaser status. There, a group of consumer plaintiffs (who ultimately settled) initially alleged both Sherman Act direct-purchaser and state-law indirect-purchaser claims. Apple moved to dismiss those claims in the district court. Apple argued that – even if the plaintiffs' indirect-purchaser claims could survive against the publishers that provided the ebook content – those claims should be dismissed against Apple because, "vis-à-vis [Apple]," the consumers "*are direct purchasers.*"[10]

That concession simply recognized the reality of Apple's relationship with the purchasers of the apps and other media it sells. Like any brick-and-mortar retailer, Apple sells consumer goods to consumers by collecting money, processing sales, and paying manufacturers; and it does so in a "store" that it curates, manages, and owns. It also goes to a great deal of trouble to maintain exclusive control over its relationship with iPhone owners because of the massive profits it can earn by doing so. If those profits incorporate prices inflated by anticompetitive conduct, iPhone owners should be able to seek damages from Apple as seller.

c. Under the holding of this Court in *Utilicorp*, there is no need to inquire into whether "[t]he rationales underlying *Hanover Shoe* and *Illinois Brick* . . .

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[10] Apple's Mem. of Law in Supp. of Mot. To Dismiss at 25, *In re Electronic Books Antitrust Litig.*, No. 11-md-2293 (DLC), ECF No. 74 (S.D.N.Y. filed Mar. 2, 2012) (emphasis added).

apply with equal force" in this case as in others. 497 U.S. at 216. Although those rationales do indeed favor the iPhone owners, *see infra* Part II, *Utilicorp* teaches that such an inquiry should not be made in each "specific case," because doing so would invite wasteful and burdensome "'litigation over where the line should be drawn,'" sacrificing the benefits of predictability and administrability that the direct-purchaser rule provides. 497 U.S. at 216-17 (quoting *Illinois Brick*, 431 U.S. at 745). That decision to avoid "litigat[ion] [of] a series of exceptions" as an "unwarranted and counterproductive exercise," *id.* at 217, was a compelling reason for this Court to deny a damages action to Kansas – which the Court did not seriously dispute could otherwise have proved significant injuries to its citizens on the facts of that case.

Consistent with that holding, this Court should reject Apple's invitation (at 5) to engage in a free-ranging inquiry into whether this case implicates the same "concerns about pass-through and duplicative recovery evident in each of *Hanover Shoe*, *Illinois Brick*, and *UtiliCorp*." Accepting Apple's invitation to change the direct-purchaser rule would depart from *Utilicorp*'s categorical approach and open the door for courts to create ad hoc rules that would bar even direct purchasers from suing on a case-by-case basis in antitrust litigation around the country. Concerns about the size, complexity, and pace of antitrust litigation are no less pressing now than they were in 1990. Nor would a fact-specific inquiry in this case even provide much guidance for district and circuit courts confronted with other direct-purchaser issues in the future: no other company has created a system structured like Apple's or as finely tuned to extracting

profits by channeling customers' choices through monopolistic control. *See infra* Part II.B.2.

Apple goes so far as to say (at 19) that "[w]ho processes the sale, collects the purchase price, and delivers the goods" – all the ordinary indicia that one would look at to identify a purchase – should "make[] no difference at all," and that courts instead should select plaintiffs based on their view of "pricing dynamics and specifically the difficulty of trying to figure out how the party that first bears an overcharge will adjust its pricing." That sweeping position would deny plaintiffs the right to seek damages whenever a defendant can make the economics of the transaction appear to be complicated. This Court, however, held the opposite in *Illinois Brick* and in *Utilicorp*, where it warned against trying to determine whether a particular pass-on issue was "susceptib[le] of proof in a judicial forum." *Illinois Brick*, 431 U.S. at 744-45, *quoted in Utilicorp*, 497 U.S. at 216. In seeking to deploy such arguments against direct purchasers in this case, Apple bears a heavy burden to demonstrate that the concerns expressed in *Utilicorp* and *Illinois Brick* warrant denying direct purchasers their statutory claim.

2. Apple fails to show that the owners do not directly purchase the monopolized product

In addition to its general argument that this Court should reconfigure *Illinois Brick* as a case-by-case inquiry, Apple gives three principal reasons why – despite its concession that iPhone owners buy apps from Apple – respondents are not direct purchasers of the monopolized product. None is persuasive.

a. Apple attempts (at, *e.g.*, 36) to recast the subject of this case as a monopoly on "distribution services,"

"not . . . apps." The complaint, however, clearly alleges that the relevant market is the "aftermarket for software applications that can be used only on iPhones." *E.g.*, App. 58a (¶ 65). Similar phrasing is used throughout the complaint. *See* App. 41a, 43a, 48a-49a, 56a, 59a-60a (¶¶ 3, 8, 29, 52-53, 66-69). Those allegations govern on review of an order granting a motion to dismiss. *See Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 751 n.2 (2017); Pet. Br. 6. The well-settled principle "that the plaintiff is the master of the complaint," *Caterpillar Inc. v. Williams*, 482 U.S. 386, 398-99 (1987), bars Apple's attempt to seek dismissal based on a revision of respondents' claim that respondents did not plead.

By contrast, the phrase "distribution services" appears nowhere in the operative complaint. As support for its characterization of the complaint, Apple quotes only (at 2, 36) allegations that it "derive[d] supra-competitive profits from the distribution of iPhone apps worldwide" and that it has "cornered 100% of the worldwide distribution market for iPhone applications." App. 41a (¶ 3). Those allegations do not limit the owners' claims to distribution services, but rather define those claims as applying to the aftermarket for iPhone apps at the distribution (that is, retail) level – the level at which Apple sells them. There is nothing unusual about a claim that a market is cartelized or monopolized at the distribution or retail level.[11] If

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[11] *See, e.g., Otter Tail Power Co. v. United States*, 410 U.S. 366, 368 (1973) (describing successful suit for monopolization of "the retail distribution of electric power"); *United States v. Crescent Amusement Co.*, 323 U.S. 173, 179, 183-84 (1944) (affirming injunction against conspiracy of motion picture exhibitors to monopolize the business of operating movie theaters in certain towns; declining to consider, as "immaterial," whether movie

one company acquired all the gas stations in a metropolitan area, then the price of gas to drivers in that market would rise to supracompetitive levels regardless of whether gasoline producers or wholesalers were competing with one another.

Even if the relevant market here were the market for app-distribution services (which it is not), Apple still would have no support for its assertion (at 34-35) that it provides those distribution services solely to developers and not to iPhone owners. To the contrary, Apple's own Services Terms describe the App Store as a "Service[]" that allows customers to "buy . . . [or] license . . . apps." *See supra* p. 5. Thus, even on Apple's own inaccurate characterization of the transaction, Apple still provides app-distribution services directly to iPhone owners, and iPhone owners pay money directly to Apple. If respondents can prove they pay more as a result of Apple's anticompetitive conduct, then the Clayton Act permits them to recover the resulting damages.

Apple further errs in invoking (at 35) this Court's recent decision in *Ohio v. American Express Co.*, 138 S. Ct. 2274 (2018) ("*Amex*"), and describing the App Store as a "two-sided platform[]." As this Court explained in *Amex*, a two-sided transaction platform is "best understood as supplying only one product – transactions – which is jointly consumed" by the parties on both sides of the platform. *Id.* at 2286 n.8.[12]

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distributors – the next level of the supply chain – were involved in the conspiracy).

[12] The contrast between a credit card network and the Apple App Store is stark. A credit card network is indifferent to the nature of the purchase and sale that gives rise to a financial transaction, and the service provided is the purely financial one of enabling payment – whether for "a chair, a milk can, or eight

The Apple Store is not a "transaction platform" but a retail operation selling apps; the fact that Apple collects payment from customers and renders payment to suppliers does not make it a two-sided transaction platform any more than a corner grocery, which does the same thing. Moreover, even if the App Store were appropriately classified as a two-sided transaction platform, Apple would be selling transactions (not apps and not app-distribution services) simultaneously to developers and iPhone owners. As *amicus* Verizon notes (at 9-11), the interaction of such a classification with the direct-purchaser rule is not at all clear. There is no need to use such a complex model where Apple has set up a "Store" that purposefully emulates a traditional retailer.

b. Apple also errs in claiming (at 19) that, when selling apps to iPhone owners, it is not acting on its own behalf but is merely a "sales agent[] . . . follow[ing] [its] principals' instructions as to what price to charge," and in comparing itself (at 37) to a "travel agent 'sell[ing]' airline tickets (for airlines)." To begin with, the general definition of an agent is one that "act[s] on the principal's behalf and subject to the principal's control." Restatement (Third) of Agency § 1.01 (2006); *see* IIA Areeda & Hovenkamp ¶ 346f, at 194 (where the ultimate seller controls the intermediate seller, the plaintiff is considered to purchase directly from the ultimate seller for *Illinois Brick* purposes). Here, Apple is in control – it offers take-it-or-leave-it terms to both developers and iPhone owners, reserving

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volumes of Gibbon." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 399 (1999) (Souter, J., concurring in part and dissenting in part). By contrast, Apple carefully controls the products offered through its App Store as well as limits the prices charged for them to even dollar amounts (less a penny).

the right to change those terms unilaterally at any time. If Apple's contention that it is a sales agent in the relevant sense of being controlled by the developers is even plausible, it at best points to a factual dispute that should not be resolved in Apple's favor on a motion to dismiss.

Similarly, Apple's repeated contention (at, *e.g.*, 35) that developers set the prices for apps is partly untrue and partly misleading. The contention is untrue because, as Apple admits (at 9), Apple restricts developers' pricing choices to prices "ending in 99 cents," effectively ruling out 99% of possible prices, reducing price competition among developers, and shoring up prices in the App Store. It is hard to imagine a travel agent telling competing airlines that all ticket prices must "end in 99 dollars" – unless, of course, the travel agent had somehow acquired exclusive rights to sell airline tickets to an entire market of valuable customers, in which case it could call the shots much as Apple is doing now.

Apple's pricing contention also is misleading because, although app developers now can choose any price ending in 99 cents, that choice is given to them by Apple, and Apple has the technological ability and contractual right to change it at any time. If Apple decided tomorrow to alter its agreement with developers and freeze App Store prices at their current levels – or at half those levels, or at double them – neither iPhone owners nor developers could do anything about it except for ceasing to use the App Store. Apple's decision for now to allow developers a limited choice in establishing pricing for apps as part of Apple's own profit-maximizing strategy should not enable it to claim that developers are the ones in control.

More generally, Apple's insertion of agency language in its contracts should not alter the antitrust analysis; it does not affect the directness of the purchase of apps by iPhone owners from Apple itself or the substance of the transactions either between Apple and the developers or between Apple and the iPhone owners. *See American Needle, Inc. v. National Football League*, 560 U.S. 183, 191 (2010) (explaining that, in antitrust, this Court has "eschewed . . . formalistic distinctions in favor of a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate"); *Simpson v. Union Oil Co.*, 377 U.S. 13, 24 (1964) (refusing to permit "legality for antitrust purposes [to] turn on clever draftsmanship"). The same is true of Apple's language stating that there is a "sales contract" between the iPhone owner and the developer to which Apple is "not a party." Apple Services Terms § G. That language means little; the Apple Services Terms themselves obligate the iPhone owner to pay Apple – not the developer – for the app,[13] and they give Apple the right to enforce the terms of the app's license agreement just as the developer could.[14]

That point is further illuminated by the leading antitrust treatise, which addresses the specific hypothetical that Apple invokes – travel agents selling

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[13] *See* Apple Services Terms § B ("Apple will charge your payment method (such as your credit card . . .) for any paid Transactions . . . . If we cannot charge your payment method for any reason . . . , you remain responsible for any uncollected amounts . . . ."); *see also* App. 52a (¶ 41) (alleging that "Apple sells the apps" and "collects the entire purchase price").

[14] *See* Apple Services Terms § G ("You acknowledge and agree that Apple is a third-party beneficiary of the [end-user license agreement] applicable to each Third Party App and may therefore enforce such agreement.").

airline tickets – and concludes that, for purposes of the *Illinois Brick* rule, the agent acts as a purchaser-reseller even though for purposes of contract and property law it may act as a broker and never own the tickets. *See* IIA Areeda & Hovenkamp ¶ 345, at 183-84 (arguing that, "if one travel agency deals in traditional brokerage arrangements for flights to the Superbowl while another buys tickets in a large block and resells them," both agencies are engaged "in the sale of Superbowl travel notwithstanding the different characterizations of their vertical transactions").[15] The treatise draws the conclusion that a broker can sue a combination of upstream suppliers, just as a purchaser-reseller could. The same reasoning shows equally that consumers can seek damages from a cartel of brokers (or "sales agents"), just as they could from a monopolizing reseller, if those brokers use their market power to increase the price of tickets.

c. Apple sought review in this Court primarily on the strength of the Eighth Circuit's decision in *Campos v. Ticketmaster Corp.*, 140 F.3d 1166 (8th Cir. 1998), and now defends that decision only briefly (at 6, 38-39). *Ticketmaster*'s flawed reasoning and incorrect result underscore the defects in Apple's position.

In *Ticketmaster*, plaintiff concertgoers sued Ticketmaster for "monopolizing, or attempting to monopolize, the market for ticket distribution services" and for "engaging in price fixing with various concert venues and promoters." 140 F.3d at 1168. Ticketmaster had a monopoly on ticket distribution, the complaint

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[15] *See also* IIA Areeda & Hovenkamp ¶ 345, at 183 ("Denying standing because 'title' never passes to a broker is an overly lawyered approach that ignores the reality that a distribution system that relies on brokerage is economically indistinguishable from one that relies on purchaser-resellers.").

alleged, because it had entered "long-term exclusive contracts with almost every promoter of concerts in the United States," giving Ticketmaster the exclusive "right to handle the vast majority of ticket sales for almost every large-scale popular music concert in the United States." *Id.* The concertgoers alleged that Ticketmaster used that market control "to extract . . . supracompetitive fees for ticket distribution services." *Id.* at 1169.

The Eighth Circuit believed that this Court's indirect-purchaser cases support the proposition that "[a]n indirect purchaser is one who bears some portion of a monopoly overcharge only by virtue of an antecedent transaction between the monopolist and another, independent purchaser." *Id.* Applying that approach, the majority reasoned that the plaintiff concertgoers were indirect purchasers because their "inability to obtain ticket delivery services in a competitive market is simply the consequence of the antecedent inability of venues to do so." *Id.* at 1171 (emphasis added). Put differently, "ticket buyers only buy Ticketmaster's services because concert venues have been required to buy those services first." *Id.*

Ticketmaster's antecedent-transaction test is not consistent with the line this Court drew in *Hanover Shoe*, *Illinois Brick*, and *Utilicorp*. Those cases tie statutory authorization to seek damages to the far simpler and more administrable concept of a direct purchase. Moreover, the Eighth Circuit's reasoning led it to a strange and incorrect result: even though ticket buyers paid "distinct service and convenience fees" "directly to Ticketmaster," those buyers were barred from recovering any overcharge that Ticket-master was in a position to impose only because concert venues had agreed to use Ticketmaster's

services first. 140 F.3d at 1171. The court of appeals' speculation that concert venues may have charged less for underlying tickets to account for the charges that concert goers had to pay Ticketmaster to avoid a trip to the venue box office, *see id.* at 1171-72, turns *Illinois Brick* on its head: instead of a bright-line rule confirming direct-purchaser suits, the *Ticketmaster* approach denies direct purchasers the right to bring suit based on an amorphous, speculative standard.

In any event, even *Ticketmaster*'s test would identify iPhone owners as the market participants whom Apple exploited to create a monopoly by selling them "closed" iPhones. Here, the earlier transaction that creates the preconditions for monopoly pricing is Apple's sale of iPhones to iPhone owners, coupled with technological barriers that "prevent iPhone consumers from installing and running apps that were not sold or approved by Apple." App. 45a, 49a (¶¶ 14, 30). Without the transaction between Apple and the iPhone purchaser, any deal between Apple and the app developer is economically irrelevant from the consumer's perspective.[16] Just as concertgoers came to Ticketmaster because it already had locked up the concert venues, the developers here came to the App Store because Apple already had constrained iPhone owners into App-Store-only purchasing.

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[16] It also is economically irrelevant from the app developer's perspective, because the developer cannot supply an app for Apple to sell through the App Store for use on an iPhone until Apple sells that device to a customer.

II. THE POLICY CONCERNS THAT UNDERLIE *ILLINOIS BRICK* SUPPORT THE iPHONE OWNERS' RIGHT TO SEEK DAMAGES

The conclusion that the direct-purchaser rule authorizes respondents' action is reinforced by the policy concerns that underlie that precedent. iPhone owners are direct purchasers of apps from Apple and are damaged by higher prices caused by Apple's anti-competitive conduct. Contrary to Apple's arguments, there is no alternative direct purchaser in a position to sue (and thus double recovery is not a concern) because app developers are suppliers to Apple – of apps that Apple sells through its App Store – not "direct purchasers of distribution services" as Apple (at 16) and its *amici* assert. Even if Apple's characterization were accepted, it would not change the result, because the measure of harm that purchasers and developers respectively suffer does not overlap. And, finally, a damages action for iPhone owners helps to vindicate the deeply rooted policy in favor of private antitrust enforcement, without endangering other technology platforms that do not engage in monopolistic conduct.

To be clear, a virtue of the *Illinois Brick* direct-purchaser rule is that it is not a multi-factor balancing test, and it eliminates the need to weigh such considerations before a claim for damages may proceed. *See Pacific Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438, 452 (2009) ("We have repeatedly emphasized the importance of clear rules in antitrust law."). Apple could not have doubted that it would have to defend against damages claims asserted by purchasers from the Apple App Store, as it effectively conceded in the *Apple eBooks* case. In any event, policy considerations undermine any possible argument that the Court should make a new exception to *Illinois Brick* here.

A. The iPhone Owners' Action Does Not Threaten Overlapping Or Duplicative Recovery

1. This Court rejected the defensive use of a pass-on theory in *Hanover Shoe* and the offensive use of such a theory in *Illinois Brick* in part because, given overlapping damages among different levels of purchasers, a defendant would face duplicative recoveries if all levels were permitted to sue. *See Hanover Shoe*, 392 U.S. at 492-94; *Illinois Brick*, 431 U.S. at 730-33; *see McCready*, 457 U.S. at 474-75 (explaining that *Illinois Brick* sought to avoid "the risk of duplicative recovery engendered by allowing every person along a chain of distribution to claim damages arising from a single transaction that violated the antitrust laws").

That risk is not present here. If the iPhone owners prevail, they will be entitled to the full amount of the unlawful overcharge that they paid to Apple. That overcharge is the difference between the price the device owners paid Apple for an app they bought from it in the monopolized retail market and the price of the same or an equivalent app in a hypothetical competitive market – one in which owners could purchase either directly from app developers without going through the App Store or from alternative distributors that might offer discounts to attract business away from Apple. *See Chattanooga Foundry*, 203 U.S. at 396 (affirming Sherman Act damages verdict "for the difference between the price paid and the market or fair price that the [plaintiff] would have had to pay under natural conditions"); App. 53a-56a (¶¶ 45-53) (describing the differences between the actual market and a competitive one). That overcharge has not been passed on by anyone to anyone. No part of the iPhone owners' recovery would belong to any other party.

Apple contends (at, *e.g.*, 31) that the only proper plaintiffs would be app developers. But even assuming that a developer could sue,[17] any damages from its lawsuit would be categorically different from iPhone owners'. As a supplier of apps, rather than a purchaser of apps, a developer's damages would be the difference between (1) the profits the developer would have earned selling its apps in a hypothetical market in which iPhone owners are free to purchase apps from the seller of their choice and (2) the profits the developer actually earned through the App Store. Thus, the vendor would be suing Apple for acting – in substance, if not in form – as a monopsonist (sole buyer) of iPhone apps, rather than as a monopolist (sole seller) of such apps. *See Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 321-22 (2007) (noting the "close theoretical connection between monopoly and monopsony" and the "similar legal standards" that apply to the two).

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[17] Apple would have a substantial argument that the app developers could not sue because Apple's market power over them stemmed from a voluntary contractual agreement between the developers and Apple that the developers would sell apps to iPhone owners only through Apple's App Store. *See Newcal Indus., Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1048 (9th Cir. 2008) (allegations of market power are insufficient if they "rest[] on market power that arises solely from contractual rights . . . knowingly and voluntarily g[iven] to the defendant") (citing, among other cases, *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 440-41 (3d Cir. 1997)). Respondents made this point in their brief in opposition (at 12-13), and Apple does not respond to or contest it. If Apple could establish both that iPhone owners are indirect purchasers of its services and that developers that directly purchase its services voluntarily agreed to the contractual rights that give it market power, then its contracts successfully would immunize the App Store from antitrust damages liability to any private plaintiff.

So understood, an app developer's damages would not duplicate or overlap with respondents' damages. Indeed, the developer's damages might be positive, zero, or negative – some developers may benefit from Apple's control over the market, especially because Apple's 99-cent rule impedes price competition among developers. For example, without the 99-cent rule, competition from other developers might force the retail price for a particular app to 49 cents per app purchase rather than 99 cents. On a per-app basis, that drop (and the resulting diminution in the amount the app's developer would receive as its wholesale price) would outweigh the effect of any decrease in Apple's 30% markup. And, although the developer might sell more apps at the lower price, it still might lose revenues overall, so that it would be worse off. Regardless, any damages suffered by the developer would be distinct from the iPhone owners' damages based on the supracompetitive retail prices those owners pay Apple.[18]

The possibility that Apple's retail monopoly provides app developers higher revenues and profits than they would earn in a competitive market – while simultaneously harming iPhone owners through higher retail prices – clearly shows that this case is not the kind of indirect-purchaser scenario where *Illinois Brick* bars damages claims. In a true indirect-purchaser situation, the indirect purchaser suffers an overcharge because the direct purchaser itself has suffered an

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[18] Apple quotes (at 33) respondents' statement in their brief in opposition (at 12) that the app developers' damages would be "a piece of the same 30% pie" as respondents'. That statement accepted Apple's premise that the developers would conceive their suit as a suit for app-distribution services. But the developers would not have to adopt that concept, and there is little reason other than Apple's say-so to believe they would.

overcharge and passed it on to the indirect purchaser. The indirect purchaser's damage claims thus depend on the direct purchaser having damage claims of its own. A consumer suing a middleman retailer, however, can certainly suffer an overcharge even though the retailer's wholesalers might have zero or negative antitrust damages.

In any event, it should not be surprising that Apple – as the operator of a monopoly "Store" where it exercises market power on both the buy side and the sell side – at least theoretically might face antitrust liability from more than one source. *See Weyerhaeuser*, 549 U.S. at 321 n.2 (explaining circumstances under which a monopsonistic firm's predatory strategy in its input market might be justified by an opportunity to earn monopolistic profits in its output market); *American Tobacco Co. v. United States*, 328 U.S. 781, 791-93 (1946) (affirming Sherman Act convictions where jury found "dominance and control by petitioners in recent years over purchases of the raw material *and* over the sale of the finished product in the form of cigarettes") (emphasis added); *see also Loeb*, 306 F.3d at 481 ("[D]ifferent injuries in distinct markets may be inflicted by a single antitrust conspiracy, and thus . . . differently situated plaintiffs might be able to raise claims."). The direct-purchaser rule does not address that kind of multiple liability, which is unrelated to passing on damages "along a chain of distribution." *McCready*, 457 U.S. at 474-75.

Apple might respond to an app developer's action seeking damages by arguing (as it has here) that it does not buy apps from developers, but merely sells them distribution services and acts as their sales agent in selling their apps to iPhone owners. But the developers could well reply (as respondents argue here)

that Apple's self-serving contract language cannot override economic reality in an antitrust analysis. *See supra* pp. 34-35 (citing *American Needle*, 560 U.S. at 191; IIA Areeda & Hovenkamp ¶ 345, at 183). As the owner-operator of the only "Store" where iPhone owners buy apps, Apple has adopted the role of a retailer, functionally buying from developers as wholesalers and selling to iPhone owners as consumers.

Indeed, any wholesale-retail arrangement "could be written as a brokerage agreement," allocating risk and other economic characteristics "in any way the parties please." IIA Areeda & Hovenkamp ¶ 345, at 183. Any retailer (or combination of retailers) that dominates a local or regional market could, in addition to exercising its market power over prices, require wholesalers needing access to that market to sign a contract appointing it as a "sales agent" or "broker"; providing that it would sell "on consignment"; or, as here, setting itself up as a provider of "distribution services." So long as the retailer has market power to affect prices on both sides, such "bit[s] of formalism," *id.*, do not and should not matter. *Cf. Simpson*, 377 U.S. at 21-22 (refusing to recognize for antitrust purposes a "consignment" arrangement that permitted a gasoline company to "administer[] prices on a vast scale" at the retail level). Where, as here, the putative retailer-agent is clearly a "distinct economic entit[y]" from its nominal principal, *Fuchs Sugars & Syrups, Inc. v. Amstar Corp.*, 602 F.2d 1025, 1031 n.5 (2d Cir. 1979), courts should treat it like any other retailer – as buying from its wholesalers and selling to its customers.[19]

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[19] *Fuchs Sugars* addressed whether a broker was acting as an agent of a sugar refiner for purposes of determining whether the refiner and the broker could conspire under § 1 of the Sherman Act. *See* 602 F.2d at 1030-31; *see also American Needle*, 560 U.S.

Apple also might argue that the app developers cannot complain of monopsonistic pricing because (as it asserts in its brief here at 40) it permits them to "set their own app prices." But the developers would reply that for the vast majority of paid apps – which, from the iPhone owner's perspective, cluster at the 99-cent mark, *supra* p. 7 – Apple's 99-cent rule functionally sets the developer's price at 69.3 cents. Apple forbids a lower (non-zero) price, and the market will not bear a higher one because "[u]sers expect simple apps to be either free or 99 cents."[20] In a competitive market, the developer might expect to make more money either from a higher price per app (for example, 90 cents per sale from a retailer that still charged iPhone owners 99 cents) or from more sales at a lower price (for example, 70 cents per sale on a larger number of app sales from a retailer that charged iPhone owners

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at 194 n.5 (noting that this question is governed by "substance, not form"). That approach is instructive here because the question whether an agent is a distinct economic entity is largely if not entirely congruent with the question whether "the purchase . . . through [the agent] was in all respects a purchase directly from" its principal. *Fuchs Sugars*, 602 F.2d at 1031 n.5 (considering the agent's "function[s]," its control over "price and terms," and its role in the "vertical distribution of the . . . product"); *see also Pink Supply Corp. v. Hiebert, Inc.*, 788 F.2d 1313, 1316 (8th Cir. 1986) (considering whether agent "function[s] as an integral part of the corporate entity, represent[s] no separate step in the distribution chain, act[s] for the corporate principal's benefit and [is] functionally indistinguishable from [an] employee[]"); *Holter v. Moore & Co.*, 702 F.2d 854, 856 (10th Cir. 1983) ("[T]he inquiry . . . centers on the independence of the allegedly conspiring actors."). Apple, which created the App Store for its own benefit, which acts in its own interest, and which has and exercises substantial control over the pricing and terms of transactions with iPhone owners, would not meet any of the variations on this test.

[20] Nick Babich, *How To Determine the Right Price For Your Mobile App*, Medium (Feb. 7, 2016), https://medium.com/@101/how-to-determine-the-right-price-for-your-mobile-app-88b266d64ea0.

only 77 cents). Either way, the app developers and the iPhone owners would be seeking to recover for "different injuries in distinct markets," *Loeb*, 306 F.3d at 481, not twice for the same injury.

2. Another reason given by the Court for its rulings in *Hanover Shoe*, *Illinois Brick*, and *Utilicorp* was that it would be difficult to determine how intermediate sellers would set their prices if the overcharge had not been imposed. By "concentrating the full recovery for the overcharge in the direct purchasers," *Illinois Brick*, 421 U.S. at 733-35, the Court sought to avoid that calculation. Apple argues (at 40) that the same concern is present here because of the "complexity and uncertainty of estimating . . . pricing decisions," which it erroneously claims are made solely by developers. But any action brought by the developers would require damages calculations at least as complex as those implicated in this case, because there is no reason to believe that in a competitive market prices would conform to Apple's 99-cent stricture.

The app developer's damages case also would be further complicated by the need to estimate the volume of sales in a competitive market. Because the developer could argue that it would have sold more apps by selling to a retailer whose price to iPhone owners was lower, it would be entitled to recover for such lost sales. Thus, the developer's case might well require calculation of both the wholesale and the retail prices and sales figures in the competitive "but-for" world.

To be sure, the market conditions affecting purchase and supply of apps may pose complexities of proof that the calculation of overcharges by the building-supply cartel in *Illinois Brick* did not. But that complexity does not result from allocating a single pot of damages along a distribution chain. Any complexity cannot be

eliminated – let alone eliminated on a principled basis – through Apple's approach of denying direct purchasers their right to seek damages under the Clayton Act.

B. The iPhone Owners' Action Is Consistent With The Proper Role Of Effective Private Enforcement

1. This Court consistently has emphasized that "Congress created the treble-damages remedy of § 4 precisely for the purpose of encouraging *private* challenges to antitrust violations." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979). Accordingly, each time the Court has addressed the indirect-purchaser rule, it has taken care to protect § 4's private-enforcement mechanism. *See Utilicorp*, 497 U.S. at 214 ("We have maintained, throughout our cases, that our interpretation of § 4 must promote the vigorous enforcement of the antitrust laws."); *Illinois Brick*, 431 U.S. at 737; *Hanover Shoe*, 392 U.S. at 494; *see also* IIA Areeda & Hovenkamp ¶ 346e, at 194 (explaining that the *Illinois Brick* rule is grounded on "the belief that simplified administration improves antitrust enforcement"). Congress's protection of private enforcement would be thwarted here if Apple were allowed to prevail. iPhone owners, unlike app developers, directly bear the supracompetitive prices and have the appropriate incentives to enforce the antitrust laws. Apple's rule, by contrast, would immunize it from damages liability in private suits.

It is not clear that app developers have an incentive or an ability to sue. If they have an incentive to sue, it is because the developers are being underpaid and not because iPhone owners are being overcharged. *See supra* pp. 40-42, 44-45. Yet even that incentive may not be present: Apple's anticompetitive practices doubtless benefit at least some developers, which will have no reason or basis to sue. And even developers

that believe they are making less than they would in a market free of Apple's retail monopoly may be deterred by the knowledge that Apple has the contractual right to remove their apps from the App Store at any time and for any reason, if it deems such action "prudent." *See supra* p. 8. An app developer that sued Apple and had its app removed from the App Store during the pendency of the lawsuit likely would be ruined financially before the suit was resolved.[21]

Looking at the matter from the other end, the specific concerns about incentives to bringing private actions that the Court raised in its earlier decisions are absent here. Where a business that is a direct purchaser from the monopolist is able to maintain a private enforcement action, such as the shoe manufacturer in *Hanover Shoe* or the masons in *Illinois Brick*, a rule spreading damages across the supply chain may decrease that potential plaintiff's incentive to sue. Where, as here, the monopolist deals with and sells directly to consumers, consumers have the same incentive – the damages available to motivate private enforcement are not dispersed among multiple purchasers in a chain.

2. Private actions based on the kind of theory that respondents advance here also will focus on cases where enforcement is needed – which, based on

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[21] The Court noted in *Illinois Brick* that "direct purchasers sometimes may refrain from bringing a treble-damages suit for fear of disrupting relations with their suppliers," 431 U.S. at 746, and acknowledged that such a concern weighed against the direct-purchaser rule, but found it insufficient "on balance" to outweigh other concerns that moved the Court, *id.* Here, where the direct-purchaser rule supports respondents, *see supra* Part I, the concern that developers may be deterred from enforcing the antitrust laws provides an additional reason to apply that rule as the Court has articulated it.

the current state of the industry, will be few but important. Apple complains (at 44) that the Ninth Circuit's holding "will consistently result in the wrong answer when the distributor is an agent rather than a price-setting retailer." As we have shown, Apple is not an agent in the relevant sense. Respondents seek a rule that would hold online retailers to account if the retailers, themselves, engage in unlawful anticompetitive conduct that harms consumers who purchase from those retailers. That is what antitrust is for.

Nor would respondents' rule affect the correct treatment of situations where an online (or offline) intermediary acts as a true agent of a seller – acting in the seller's interest and subject to the seller's control over the pricing and terms of transactions. In that situation, there "effectively has been only one sale," and so the purchaser from the intermediary can seek damages from the principal. *Jewish Hosp. Ass'n of Louisville, Kentucky, Inc. v. Stewart Mech. Enters., Inc.*, 628 F.2d 971, 975 (6th Cir. 1980); *see* IIA Areeda & Hovenkamp ¶ 346f, at 195 (arguing for this result where there is "'functional economic or other unity' of violator and direct purchaser" or where the violator "effectively controls the direct purchaser"). That is a very different case from this one, where Apple's interests are not necessarily aligned with those of the app developers and Apple is certainly not subject to their control.

Apple's parade of horribles in the form of supposed widespread industry liability lacks merit. Apple lists six online marketplaces that it incorrectly claims (at 45) are "the same as, or similar to," the App Store. Those marketplaces are Google Play, Ticketmaster, StubHub, eBay, Sears Marketplace, and Facebook Marketplace. Apple makes no attempt beyond assertion to show that any of those platforms engages in

monopolistic lock-in practices similar to Apple's. To the extent those companies bring together buyers and sellers without exerting control over the pricing or terms of their transactions, they likely would not be exposed to the type of action respondents have brought here – not so much because of the direct-purchaser rule as because (unlike Apple) they actually would not be monopolizing any product they sold.

a. Google's "Google Play" store offers users of Android devices access to apps that run on that operating system. While Google Play may well dominate that market, allegations that it obtained market power through anticompetitive actions would be harder to frame, because Android users can purchase – and Android developers can sell – apps from "sources other than Google Play."[22] In addition, consumers can access Google Play and the other sources from which apps may be purchased from a wide range of devices (but not, of course, the iPhone). The vast majority of those devices are not designed or sold by Google.[23] Google thus does not lock its customers into a "closed" system requiring them to shop in an aftermarket Google has monopolized, as Apple restricts iPhone owners to the App Store.

b. eBay, Sears, and Facebook provide platforms for selling general goods over the web, while StubHub hosts a similar web-based marketplace for reselling

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[22] Android Developers, *User opt-in for installing unknown apps*, https://developer.android.com/distribute/marketing-tools/alternative-distribution#unknown-sources (last visited Sept. 24, 2018).

[23] *See* Dan Frommer & Rani Molla, *The Pixel market share chart Google probably won't be showing at its event today*, recode (Oct. 4, 2017), https://www.recode.net/2017/10/4/16418170/google-pixel-market-share-2017-event-chart-data.

tickets to popular events.[24] None of the four prevents buyers and sellers from freely transacting in any other marketplace, simultaneously or alternatively. Because those marketplaces sell general goods, consumers can shop for the same good (say, a baseball signed by a famous player) on multiple sites at once. Those marketplaces thus compete on a variety of dimensions, which acts as a check on onerous terms.[25] Indeed, for most of the goods sold on those platforms, a brick-and-mortar store permits consumers to purchase without a computer or smartphone.

StubHub explicitly allows sellers "to list [their] tickets on StubHub and on other sites," provided that, if the tickets sell elsewhere, the seller "delete[s] them from StubHub immediately."[26] StubHub thus expects both buyers and sellers to shop for the best prices, selection, or services, and it competes for business on that basis.

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[24] *See, e.g.*, Facebook Help Center, *About Marketplace* ("People and businesses can use Marketplace to buy and sell items on Facebook."), https://www.facebook.com/help/1713241952104830/?helpref=hc_fnav (last visited Sept. 24, 2018); StubHub, *About us* (StubHub "enable[s] experience-seekers to buy and sell tickets whenever and wherever they are through our desktop and mobile experiences"), https://www.stubhub.com/about-us (last visited Sept. 24, 2018).

[25] *See, e.g.*, ebay Customer Service, *Get help with an item that hasn't arrived* (explaining that, if issue cannot be resolved through the seller, "we're always ready to step in and help"), https://www.ebay.com/help/buying/returns-refunds/get-help-item-hasnt-arrived?id=4042&st=7 (last visited Sept. 24, 2018); StubHub, *FanProtect Guarantee* ("StubHub backs every qualified order so you can buy and sell with 100% confidence."), https://www.stubhub.com/legal/?section=fp (last visited Sept. 24, 2018).

[26] StubHub, *Seller Policies* § 2.9, https://www.stubhub.com/legal/?section=sp (last visited Sept. 24, 2018).

Moreover, because these four marketplaces are web-based, there is no equivalent to Apple's device-based lock-in. Any consumer with an Internet connection and a web browser can shop (or sell) on any of those four platforms.

c. Ticketmaster, the subject of the *Ticketmaster* case, sells primary-market (new) tickets to events sold by the event venue. On the seller-side, Ticketmaster enters "long-term exclusive contracts" with concert promoters and venues that grant it the exclusive right to sell new (not re-sold) tickets to those events. *Ticketmaster*, 140 F.3d at 1168. However, even Ticketmaster faces competition in several ways Apple does not.

First, *buyers* are free to pursue secondary market (resale) tickets from sites like StubHub, Craigslist, Facebook Marketplace, or eBay. The existence of those platforms provides some measure of substitutability and constrains Ticketmaster and its venues from imposing monopoly prices. There is no secondary market for iPhone apps.

Second, Ticketmaster's exclusive contracts are term-limited, and other ticket-selling platforms compete for Ticketmaster's business on the usual dimensions of price and quality of service. For example, one rival, Ticketfly, "differentiates itself with its lower fees and social capabilities."[27] As of five years ago, Ticketfly had "stolen some 100 clients, including the Preakness Stakes, The Roxy on L.A.'s Sunset Strip, and New York venues such as the Bell House and Brooklyn Bowl."[28] That, of course, is impossible with the iPhone.

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[27] Daniel Roberts, *Taking down Ticketmaster*, Fortune (Nov. 27, 2013), http://fortune.com/2013/11/26/taking-down-ticketmaster/.

[28] *Id.*

The App Store is not subject to that sort of competition because it is the exclusive point of access to captive iPhone owners – not through exclusive, renewed contracts into which those owners voluntarily entered, but because Apple has locked consumers into Apple's "closed" system. App. 49a (¶ 30). Apple, compared to its peers, thus faces a unique risk of liability under the antitrust laws for the egregiously anticompetitive tactics in which it has engaged. Because only iPhone owners have the injury, incentive, and direct-purchasing relationship with Apple to complain about those monopolistic abuses, they satisfy the *Illinois Brick* rule. That is not "the wrong answer" (Apple Br. 44); that is how the system is supposed to work.

* * *

Regardless of this Court's disposition of the question presented, respondents' claims for injunctive relief are unaffected. *See, e.g., In re Warfarin Sodium Antitrust Litig.*, 214 F.3d 395, 399 (3d Cir. 2000) ("Indirect purchaser status . . . is not fatal to a plaintiff's request for injunctive relief under section 16 of the Clayton Act."). Respondents argued this point in the court of appeals, *see* Resp. C.A. Br. 53-54, but that court did not reach it. It is outside the question presented, *see* Pet. i (seeking review of respondents' right to "sue for antitrust damages"), and if necessary should be dealt with on remand, *see* U.S. Br. 18 n.4 (noting that this issue "will remain open on remand" if Apple prevails).

CONCLUSION

The judgment of the court of appeals should be affirmed.

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September 24, 2018

No. 17-204

In the Supreme Court of the United States

IN RE APPLE IPHONE ANTITRUST LITIGATION,

APPLE INC.,

Petitioner,

v.

ROBERT PEPPER, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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INTRODUCTION

Respondents' case is barred by this Court's *Illinois Brick* doctrine because the only damages theory alleged is a pass-through overcharge theory. The causal chain alleged is that (a) Apple's monopoly leads to (b) an excessive 30% commission charged to app developers that leads to (c) developers setting higher apps prices that lead to (d) consumer injury when iPhone users buy those apps at whatever prices the developers set. Those allegations make any alleged consumer injury turn on what (if anything) developers did with Apple's commission when setting apps prices—decisions that precede apps sales to consumers. As the United States explains, "Respondents are injured by Apple's allegedly exorbitant commission only if, and to the extent that, developers seek to recover some or all of that commission by increasing the prices of their apps." U.S. Br. 7.

Respondents have no answer to this key point. Neither Respondents nor their *amici* address the extensive discussion of the pass-through issues in Apple's opening brief and the United States' brief. Pet Br. 24-30; U.S. Br. 19-24. They do not articulate any damages or injury theory that would *not* depend on the premise that developers have passed through Apple's commission in their pricing decisions. Instead, Respondents admit that developers "select a retail price that Apple will charge owners for the developers' apps," Resp. Br. 7, and that they therefore seek damages on the theory that developers "will mark-up the price to cover Apple's 30%." Pepper CA9 Br. 34 n.10; *see also* JA143 (similar admission in

district court). This is a textbook theory of indirect, pass-through harm, squarely barred by *Illinois Brick*.

Respondents answer by first trying to create factual uncertainty over the issue presented, and then arguing that plaintiffs with "direct" interactions with the defendant should be entitled to seek pass-through damages, that duplicative litigation may not result in duplicative damage claims, and that an *Illinois Brick* exception is warranted for electronic commerce. The Court should reject these arguments.

First, the only relevant facts were either alleged in the complaint or conceded in argument, including the brief in opposition. Those facts bear on the key question of whether the injury claimed by Respondents is direct or indirect—principally the four steps in the causal chain described above.

Respondents' efforts to manufacture factual uncertainty relate to issues peripheral to the *Illinois Brick* rule. For example, Respondents argue that the relevant market is the "retail aftermarket for iPhone apps," not the "distribution" market described countless times below. But even if those were different markets (and they are not), the *injury theory* is the same, and that is what gives rise to the *Illinois Brick* problem. Similarly, the fact that Apple requires non-zero prices to end in $.99, which was raised for the first time in this Court, only makes the pass-through problems presented by Respondents' theory more complex. While Apple responds below to the various "factual" arguments Respondents raise, all that matters in a case about an allegedly monopolistic commission that impacts developer pricing decisions is that app developers are temporally, literally, and economically the ones directly injured by Apple's alleged misconduct. Developers alone are entitled to

bring damages claims relating to that commission under this Court's long-standing precedent.

Second, there is no basis for Respondents' argument that pass-through damages claims are permitted whenever there is direct interaction between the plaintiff and alleged antitrust violator.

This argument openly exalts form over substance by turning entirely on the formal identification of a "direct purchaser" and *prohibiting* any "further inquiry into the specifics of a case," even into the nature of the damages theory. Resp. Br. 23-24. That is not true to *Illinois Brick*, as Respondents claim. It alters the doctrine beyond recognition. The *Illinois Brick* rule has always been grounded in this Court's unwillingness to let antitrust litigation become a "massive effort[] to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge." *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 737-38 (1977). Pass-through damages theories are prohibited in whatever form they take—even where, as in *Kansas v. UtiliCorp United Inc.*, 497 U.S. 199 (1990), there is a credible argument that the overcharge necessarily would be passed on entirely. This explains why Respondents cannot cite even one case holding that "those who purchase a product or service directly from an antitrust violator" may seek pass-through damages. The amicus brief from a group of states urging this Court to overrule *Illinois Brick* is at least candid about what Respondents are truly asking for, because there is no merit to the idea that, under this Court's precedents, any transactional

relationship with the alleged antitrust violator is a license to seek pass-through damages.[1]

Third, Respondents attempt to address the inevitable duplicative recovery concerns posed by their complaint by suggesting that app developers would seek non-overlapping damages based on a "monopsony" theory. There is no basis in the Court's doctrine for this kind of speculation. The potential for multiple, competing overcharge claims is what matters, and that is undeniable here since developers would be the parties first and directly injured by any allegedly excessive commission. This Court's decision in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), gives developers a claim for 100% of any overcharge. No rational developer would forego a claim that this Court's precedents

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[1] This case does not present the occasion to reconsider *Illinois Brick*, as certain State Attorneys General propose—and notably, as the American Antitrust Institute ("AAI") opposes. *See* AAI Br. 28-29. Any meaningful change is best left to Congress, which has not disturbed the relevant language of Section 4 despite numerous proposals to overrule *Illinois Brick* and multiple other amendments to the Clayton Act. *See* Washington Legal Found. Br. 9-14; *Illinois Brick*, 431 U.S. at 736-37 (declining to reconsider *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), since "considerations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation"); *Faragher v. City of Boca Raton*, 524 U.S. 775, 792 (1998). Furthermore, every serious reform proposal on this subject goes far beyond overruling *Illinois Brick*, since that step alone would guarantee duplicative recoveries. *See* Antitrust Modernization Comm'n, *Report and Recommendations* 267 (Apr. 2007), https://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf (recommending, *inter alia*, legislation capping total damages at "the overcharges (trebled) incurred by direct purchasers").

squarely allow, let alone for a monopsony theory that does not even apply because Apple does not buy apps. Respondents also admit that "lost profits" could be "negative or zero" even in the case of an overcharge, Resp. Br. 3, which is another reason why developers would never pursue this strategy.

Fourth, Respondents ask this Court to exempt electronic commerce from the scope of *Illinois Brick*. But there is no basis for an industry-specific carve-out to *Illinois Brick*, let alone one disadvantaging one of the most important sectors of our economy. This Court has refused to go down such a path before, and none of Respondents' proposals present any reason to change course. Appropriately focused on whether there is a pass-through damages theory, the *Illinois Brick* rule can distinguish between consumers suing for a direct injury and those, such as Respondents, seeking indirect damages grounded in what happened to someone else first.

A straightforward application of *Illinois Brick* bars these pass-through damages claims.

ARGUMENT

I. RESPONDENTS ALLEGE A PASS-THROUGH THEORY OF INJURY THAT IS BARRED BY *ILLINOIS BRICK*

Respondents and their *amici* write at length about Apple's close interactions with consumers and its control of the App Store, but ignore the question of how consumers could be injured by the policies Respondents challenge as anticompetitive. That is because there is no way to determine consumer damages based on a causal chain of: *monopoly → Apple's excessive commission → app developers' higher apps prices → consumer injury* without litigating over

whether, and how, the commission first affected developer pricing decisions. Neither Respondents nor anyone supporting them have proposed a non-pass-through damages theory.[2] This case therefore remains a textbook case of indirect, pass-through injury—and an extraordinarily complex one because pass-through amounts would vary app-by-app.[3] Pet. Br. 27-29.

Respondents instead try to create uncertainty about the facts. But the district court was careful not to dismiss this case until Respondents clarified their

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[2] Respondents say that consumers would seek "the difference between the price the device owners paid Apple for an app they bought from it in the monopolized retail market and the price of the same or an equivalent app in a hypothetical competitive market." Resp. Br. 39. But that is just a long way of saying "overcharge," which is always a supracompetitive price less the competitive price. What is missing is any explanation for how Respondents would calculate the competitive price for an app without accounting for how the developer was influenced by Apple's commission.

[3] Apple and others disagree that "advancements" in econometric methods mitigate this difficulty. *See* Chamber of Commerce Br. 15-19. The primary point made in the authorities Respondents cite is simply that computers are more powerful today, which (sometimes) allows economists to estimate elasticities from large datasets. No one would ever call that easy, however. The fundamental indeterminateness of incidence analysis remains. *See, e.g.*, Edward D. Cavanagh, Illinois Brick: *A Look Back and a Look Ahead*, 17 Loy. Consumer L. Rev. 1, 10 n.39 (2004) ("[E]ven the most forceful opponents of the *Illinois Brick* holding fail to come to grips with a basic tenet of that ruling: proof of passing-on requires a number of assumptions which cannot be easily or accurately translated from the economist's hypothetical model to the real economic world."). And no advancements in econometrics can address the unique problem in this case: needing to conduct hundreds of thousands or more individual pass-through analyses.

allegations. The record is clear on the four dispositive allegations:

The alleged monopoly: The complaint alleges that Apple "cornered 100% of the worldwide distribution market for iPhone applications." Pet. App. 41a (¶ 3).

The commission: Apple required app developers to pay Apple a 30% commission on paid apps sales—supposedly a higher commission rate than would be sustainable "[i]n a truly competitive iPhone apps distribution environment." *Id.* at 55a (¶ 48).

Developer app pricing decisions: Developers then set their apps prices knowing what Apple charged for distribution. *Id.* at 52a (¶ 40).

Consumer injury: Higher apps prices allegedly resulted, because—as Respondents told both courts below—developers "will mark-up the price to cover Apple's 30%." Pepper CA9 Br. 34 n.10; JA143.

Respondents' efforts to muddy the waters change nothing.

The "retail aftermarket" and the distribution market are one and the same. Respondents claim that Apple mischaracterizes Respondents' complaint as complaining of a monopoly over an apps *distribution* market when the actual market is a "retail aftermarket for [iPhone] apps." Resp. Br. 24. This is an empty semantic dispute. *Illinois Brick* turns on the alleged causal chain of consumer injury, not on market definition.

Nevertheless, Respondents' own complaint and briefing demonstrate that "distribution monopoly" and "retail aftermarket monopoly" are, in this setting, just two different ways of saying the same thing. Indeed, Respondents themselves use these phrases interchangeably—characterizing the alleged problem

as "a monopoly on distribution services," *id.* at 14, continuously, and not just in the complaint. Their Ninth Circuit brief alone refers to a "worldwide apps distribution monopoly" twice, Pepper CA9 Br. 21, 31, and argues that Apple's "closed distribution system . . . protect[s] itself against any competition it might face in the distribution of iPhone apps." *Id.* at 5. Respondents' *amici* also routinely describe this case as one involving "a distribution monopolist." AAI Br. 19; *see also* Antitrust Scholars Br. 19 ("Apple sells distribution services upstream to developers").

Respondents' reference to an "aftermarket" is an effort to plead this case within the aftermarket doctrine of *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992), so as to limit the market to one for distribution of iPhone apps rather than all smartphone apps. *See* Resp. Br. 4 n.1; *infra* n.11. The alleged Apple monopoly at issue is still over the distribution of iPhone apps to iPhone users. The "retail aftermarket" now advanced by Respondents captures the same concept in another way: that distribution of apps to iPhone users takes place at the "retail" level of the market. It remains the same distribution market.

Apple does not buy and resell apps. Respondents suggest for the first time that Apple "has adopted the role of a retailer functionally buying from developers as wholesalers and selling to iPhone owners as consumers." Resp. Br. 43. But their complaint does not allege that. And Respondents have repeatedly acknowledged that only consumers buy apps; Apple does not. Pepper CA9 Br. 9. The Apple developer agreements cited by Respondents confirm this: developers "do[] not give Apple *any ownership interest* in [their] [a]pplications." Apple,

iPhone Developer Program License Agreement § 2.5 (Jan. 22, 2010 version) (emphasis added).[4] So Apple is fundamentally unlike a traditional retail store.

Respondents' damages theory is based "solely" on Apple's 30% commission. Respondents' theory of injury has always been rooted in the allegation that the "closed" ecosystem of the App Store "has enabled Apple to charge and collect a supracompetitive 30% fee." Pet. App. 42a (¶ 4). That 30% fee is mentioned seventeen times in the complaint, fifty-six times in Respondents' Ninth Circuit brief, and twenty-three times in the brief in opposition.

Respondents have no other damages theory. After the petition for certiorari explained the role of the 30% commission in Respondents' injury theory, Pet. 8-9, the brief in opposition conceded the point—affirming that "Respondents seek damages based solely on the 30% markup." BIO 5 (citing Pet. App. 51a-52a (¶¶ 38-41)). Respondents even dismissed the prospect of duplicative developer litigation on the ground that "there is only *one 30% markup*" and developer claims would necessarily be for "a piece of the same 30% pie." *Id.* at 12.

Developers set apps prices. Since the inception of this case, Respondents have sought to avoid the central and indisputable fact that developers set apps prices. The argument below was that Apple adds 30% to the developer's price, but that argument was not sustainable. *See* Pet. Br. 12-15. Respondents eventually admitted that it is the developer who sets the final price of an app, that Apple's 30% commission

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[4] *Available at* https://www.eff.org/files/20100127_iphone_dev_agr.pdf (last visited Oct. 19, 2018).

is collected from the developer-set price, and therefore the damages theory is that "[t]he developer is going to increase its price to cover Apple's . . . demanded profit." JA143. Respondents likewise admitted to the Ninth Circuit that developers "will mark-up the price to cover Apple's 30%." Pepper CA9 Br. 34 n.10. This case therefore comes to this Court with both courts below having found that developers set the prices that consumers pay, Pet. App. 21a, 36a-37a, and Respondents admitting it yet again. Resp. Br. 7 ("Apple permits developers to select a retail price that Apple will charge . . . .").

Respondents now claim that the developer's pricing freedom is restricted because Apple requires non-zero prices to end in $.99, and Apple retains the theoretical ability to change its policies and set prices. But neither assertion disproves that the developers set their apps prices. If anything, the $.99 pricing convention adds further complexity to the pass-through inquiry. It means that on top of everything else affecting how developers might or might not pass-through Apple's commission, the developer also must consider the need to hit a $.99 price point.[5] The salient point is that consumers can suffer injury from Apple's commission only if that commission causes

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[5] The $.99 rule does not "effectively rul[e] out 99% of possible prices." Resp. Br. 33. In fact, prices for most goods "cluster" around certain end-points, the most popular of which is $.99. For the developer who finds the jump between $0.99 and $1.99 too much, the alternatives are to shift its monetization strategy toward more in-app purchases, advertising, subscription, various combinations of those approaches, and so on. *See, e.g.*, Ailie K. Y. Tang, *Mobile App Monetization: App Business Models in the Digital Era*, 7 Int'l J. of Innovation, Mgmt. & Tech. 224 (2016).

developers to change the price (still ending in $.99 for paid apps) they would have chosen if Apple's commission were lower.

Apple is a sales and distribution agent for developers. Respondents argue that Apple cannot be an "agent" of the developers because agency law is about "control" and Apple has too much "control" over the App Store. That syllogism grossly oversimplifies the law of agency and misses the point that matters.

Apple is not advancing a formalistic "agency defense." In fact, the concept of agency did not arise in this case until after the Ninth Circuit's decision, when Apple needed to explain how the Ninth Circuit's "distributor function" rule would harm electronic commerce, much of which is organized under the agency sales model. Pet. 29-31. Apple's core argument has always been that any injury to consumers necessarily depends on developer pass-through decisions, since Apple does not set apps prices. It happens to be a defining feature of agency selling arrangements that the principal, not the agent, sets prices. But the correct application of *Illinois Brick* here does not depend on any fine points of agency law.

That said, Respondents now affirmatively rely on the express terms of the iPhone Developer Program License Agreement. As Respondents note, that Agreement confirms that "Apple acts as an agent for App Providers in providing the App Store *and is not a party to the sales contract or user agreement between [the user] and the App Provider.*" *See* Resp. Br. 5-6 (emphasis added) (citation omitted). Thus, Respondents concede that the direct sale is actually between developers and consumers, facilitated by Apple as an agent and conduit.

II. *ILLINOIS BRICK* DOES NOT ALLOW PASS-THROUGH THEORIES SIMPLY BECAUSE THE PARTIES INTERACT DIRECTLY

Respondents would have this Court hold that, in all cases, any party "who purchase[s] a product or a service directly from an antitrust violator can sue that violator for damages." Resp. Br. 23. They claim that prohibiting damages claims by directly interacting plaintiffs would create "a new exception to *Illinois Brick*." *Id.* at 38. This is incorrect. *Illinois Brick* prohibits all pass-through damages claims. Honoring that principle here does not create an *Illinois Brick* exception; it falls squarely within the rule.

The *Illinois Brick* line of cases has always focused on the practical and jurisprudential problems posed by pass-through damages claims, including the potential for duplicative damages. *Hanover Shoe* held—without using the term "direct purchaser"—that antitrust defendants cannot assert, as a defense, that the plaintiff passed on any harm to its own customers. *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 491-93 (1968). *Illinois Brick* held that plaintiffs cannot claim damages premised on the theory that an overcharge was passed through to them. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 737-38 (1977). And *UtiliCorp* held that this rule remains firm even when there is reason to doubt that the direct purchaser absorbed any of the overcharge. *Kansas v. UtiliCorp United Inc.*, 497 U.S. 199, 217 (1990).

The terms "direct purchaser" and "indirect purchaser" reflect this, as they were coined in *Illinois Brick* to contrast the first to bear an overcharge from others indirectly injured. Masonry contractors who directly purchased price-fixed concrete blocks were

"direct purchasers" while governmental entities who purchased entire buildings (incorporating concrete blocks) were "indirect purchasers." In that context, the Court was concerned that "[t]he only way in which the antitrust violation alleged could have injured [the "indirect purchasers"] is if all or part of the overcharge was passed on by the masonry and general contractors." *Illinois Brick*, 431 U.S. at 727. "Directness" was thus in relation to the alleged overcharge, and "direct purchaser" was "shorthand for a party that bears an antitrust violator's unlawful overcharge in the first instance." U.S. Br. 8-9. The plaintiff's proximity to the overcharge is the analytical foundation of the "bright line" rule that "the overcharged direct purchaser . . . is the party 'injured in his business or property' within the meaning of" the Clayton Act. "[A]n indirect purchaser," by contrast, "should not be allowed to use a pass-on theory to recover damages from a defendant." 431 U.S. at 729.

Here, app developers are "direct purchasers" in the exact sense in which *Illinois Brick* used that term. They are analogous to the masonry contractors, who suffered "an antitrust violator's unlawful overcharge in the first instance," U.S. Br. 9, and whose damages claims would not implicate pass-through. Respondents, on the other hand, are claiming a derivative, indirect injury, like the government plaintiffs in *Illinois Brick*, and thus are "indirect purchasers" in the *Illinois Brick* taxonomy.

Respondents hijack the "direct purchaser" shorthand to contend that *Illinois Brick* begins and ends with whether the plaintiff deals, transacts, or buys "directly" from the alleged monopolist. But that takes the overcharge out of "overcharged direct

purchaser," making the term empty and unhelpful. Imagine how many different ways the words "sell" and "purchase" might be used. Apple "sells" iPhones, which it makes, but also "sells" apps that are made and priced by others—and result in end-user license agreements between developers and consumers. Respondents would say consumers are "purchasers" in both cases, dealing directly with Apple. But the two scenarios are fundamentally different from a Section 4 *injury* perspective. Apple is a price-setting seller of iPhones, but not of third-party apps. A claim about overpriced iPhones purchased from Apple would be a direct injury claim, but the apps claims here are not. A legal rule that ignores these important differences—indeed, that mandates "[n]o further inquiry into the specifics," Resp. Br. 24—would miss what is most important to the Section 4 question. So would the Ninth Circuit's "distributor function" rule, which arrives at an equally arbitrary outcome in a different, yet still formalistic way. Pet. Br. 41-46.

Most telling is Respondents' failure to cite any authority in support of the proposition that transactional proximity is the key to *Illinois Brick* or justifies pass-through damages. Respondents and their *amici* just assert that *Illinois Brick* is satisfied by any relationship that can be characterized as a direct purchase, without citing anything from this Court or any other to support the proposition that pass-through damages claims are then appropriate. They are never appropriate, even when an *Illinois Brick* exception applies. Pet. Br. 29 n.12.

Respondents' proximate cause argument, *see* Resp. Br. 25, cuts the wrong way. This Court's judgment to prohibit pass-through theories was

based, in part, on the long-held view that standing under Section 4 of the Clayton Act is limited by notions of proximate cause, and *Hanover Shoe's* holding that pass-through damages arguments violate the "general tendency of the law, in regard to damages at least, . . . not to go beyond the first step." 392 U.S. at 490 n.8 (citation omitted). The "first step" that *Hanover Shoe* referenced is between the injurious conduct alleged and the overcharge, which here is the commission. Respondents are not at that first step; developers are. Respondents seek damages based on a secondary effect of the overcharge on apps prices, which is an indirect injury theory.

Respondents also misrepresent the *eBooks* case as an Apple "concession" that consumers could always advance damages claims against Apple in a similar market structure. *eBooks* involved allegations of a vertical conspiracy with publishers to raise the price of e-books. There was no independent price-setter between the conspiracy and consumers. *Illinois Brick* therefore did not apply.[6] This monopolization case, which is based on injury flowing through app developers who no one claims are conspirators, is different.

Respondents accuse Apple of inviting "a free-ranging inquiry" about "'pass-through and duplicative recovery'" that would somehow allow defendants to hide behind complicated transaction structures. Resp. Br. 28-29 (citation omitted). This is incorrect. Whether the plaintiff is seeking pass-through

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[6] The lower courts have held that, in vertical conspiracy cases, a plaintiff may sue any co-conspirator for damages when the price that they have paid directly is the one that was unlawfully fixed.

overcharges has always been the central concern of the *Illinois Brick* line of cases. And here, focusing on the injury theory and the potential for duplicative overcharge litigation is more accurate than Respondents' focus on form—or the Ninth Circuit's focus on "functions." *See* 2A Phillip E. Areeda et al., *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 346j (3d ed. 2007) ("When distribution chains are complex, making it difficult to identify who dealt directly and who indirectly, it is less important that the court formalistically identify a direct purchaser and more important that it adhere to the principles that the *Illinois Brick* rule reflects.").

Respondents' formalism is self-defeating in any event. As noted, Apple is formally an agent that facilitates a direct sale or licensing relationship between the developer and the consumer. *See* Resp. Br. 5-6 & n.5 (quoting the relevant agreement). It is not a party to any such agreement except in the rare case in which it is the app developer. *Id.* These "direct purchases" are thus formally agent-facilitated licensing transactions between app developers and consumers.[7] Respondents' claims fail on that ground too.

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[7] Respondents incorrectly contend that the Areeda antitrust treatise takes the position that "for purposes of the *Illinois Brick* rule, the agent acts as a purchaser-reseller even though for purposes of contract and property law it may act as a broker[.]" Resp. Br. 35. The cited section of the treatise is not about *Illinois Brick*. Instead, it makes an unrelated point about when consumer standing is available to "brokers and others who stand in a buyer-like position but who may not actually take title to the goods that are sold." Areeda, *supra* ¶ 345.

III. THE POTENTIAL FOR DUPLICATIVE RECOVERY BY APP DEVELOPERS IS INDISPUTABLE

Respondents do not defend the Ninth Circuit's error in concluding that the prospect of duplicative claims by developers "makes no difference to [the] analysis" in this case. Pet. App. 20a. Rather, they contend that every developer plaintiff would abandon the overcharge claim Respondents found optimal and advance "monopsony" claims seeking lost-profits damages instead. This approach would introduce into the *Illinois Brick* framework an unwarranted and unmanageable case-by-case analysis of what direct-purchaser claims might look like. It is also an implausible account of the claims developers could assert.

First, this argument admits that there may be duplicative litigation by developers, but says no one should care because developers could conceivably advance different legal theories and seek different measures of damages. There is no room in this Court's *Illinois Brick* doctrine for such an argument. *Illinois Brick* and *UtiliCorp* refused "to 'open the door to duplicative recoveries' under § 4." *Illinois Brick* 431 U.S. at 731 (citation omitted); *UtiliCorp*, 497 U.S. at 212-13.

Second, a "monopsony" developer claim makes no sense because Apple does not buy apps and therefore cannot be a monopsonist. *See Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 320 (2007) ("[A] monopsony is to the buy side of the market what a monopoly is to the sell side . . . ."). Respondents previously conceded that Apple does not "buy[] apps from the developers and resell[] the apps to consumers." Pepper CA9 Br. 9; *see also* ACT | The

App Association ("ACT") Br. 18 ("[Apple] is not a reseller of apps because it is not the owner of any third-party apps it hosts on its App Store.").

Third, Respondents previously admitted that developers would frame their damages in terms of the allegedly anticompetitive overcharge—seeking a piece of the "same 30% pie." BIO 12. No rational developer would opt for the more difficult and less valuable lost profits claim instead. That would entail foregoing the benefits of the *Hanover Shoe* rule, which "concentrate[s] the full recovery for the overcharge" in the direct purchaser's hands. *Illinois Brick*, 431 U.S. at 734-35. Respondents themselves argue the lost profits could be "zero, or negative," even if there is a supracompetitive commission. Resp. Br. 41.[8]

Respondents' duplicative litigation argument is thus legally and factually baseless.

IV. THERE ARE NO "POLICY REASONS" FOR AN *ILLINOIS BRICK* EXCEPTION FOR ELECTRONIC COMMERCE

Finally, Respondents ask the Court to create a categorical exception to *Illinois Brick* "that would hold online retailers to account if the retailers, themselves, engage in unlawful anticompetitive conduct that harms consumers who purchase from those retailers." Resp. Br. 48. There is no legal basis

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[8] Respondents also argue that "any action brought by the developers would require damages calculations at least as complex as those implicated in this case." Resp. Br. 45. That is not the case if the developers sought overcharges as they rationally would do, since by construction indirect purchasers must calculate the same initial overcharge as direct plaintiffs *and then the pass-through*. Indirect injury claims are always more complex.

for considering this request, let alone for believing that, once created, the electronic commerce exception would not be abused.

As a matter of law, Respondents' argument is foreclosed by *UtiliCorp*, where the Court held it would be "an unwarranted and counterproductive exercise to litigate a series of exceptions" to *Illinois Brick*. 497 U.S. at 217. Changing that principle would have far-reaching consequences, as Respondents are not the only ones who could muster arguments in favor of industry-specific *Illinois Brick* exceptions.

In this case, there is no basis for the suggestion that where consumers are interacting with a platform sponsor (Apple) on one side of the platform, they have *Illinois Brick* standing with respect to everything that happens on the platform. That will depend on the conduct at issue and how it affects consumers. There will be occasions where consumers are the first to bear an alleged overcharge and therefore have standing to seek damages. But that does not mean that consumers without a legitimate claim of direct injury should be allowed to seek damages too. The rationales underlying this Court's *Illinois Brick* jurisprudence permit a reasoned distinction between such cases, and do not justify a blanket exception for online commerce.

Nor is there any basis for Respondents' argument that because developers either cannot or will not assert antitrust claims against Apple, consumers should be allowed to. The argument "that direct purchasers sometimes may refrain from bringing a treble-damages suit for fear of disrupting relations with their suppliers" was rejected in *Illinois Brick*, 431 U.S. at 746, and then again in *UtiliCorp*, 497 U.S. at 217. And since then, no court has ever found

justification for a case-by-case exception to *Illinois Brick* that turns on a comparative analysis of who is most likely to sue.

Antitrust defendants should not need to apologize for the fact that those directly affected by their conduct have not sued. In this case it is true that Apple's app distribution policies have never been challenged by any developer, large or small, nor by any federal or state antitrust authority. But that is most likely explained by the fact that developers understand and have shared in the explosion of output, procompetitive benefits, and efficiencies of the iOS ecosystem, which last year alone generated $26.5 billion for iOS developers. *See* ACT Br. 9-10; Computer & Communications Industry Ass'n Br. 20-22. The absence of developer litigation, in other words, is healthy and normal, not proof that those who own the cause of action are afraid to litigate.

In all events, on the facts of this case, app developers—which include the likes of Google, The New York Times, Electronic Arts, and so on—are more "efficient antitrust enforcers" than consumer class action lawyers. This is particularly true if efficiency is defined to include a willingness to distinguish between procompetitive and anticompetitive behavior. It is the developers that contract with Apple to distribute their apps through the App Store and who live with Apple's policies day-to-day. *Are those policies output-enhancing?* No one will know more and care more than developers. *Are Apple's commissions excessive?* No one will know better than developers that the commissions are fundamentally the same as charged for other

platforms.[9] Developers are also the more efficient enforcers because their financial incentives to sue are appropriately moderated by the fact that they would internalize any adverse effects of condemning beneficial practices by Apple.

Respondents' claim to be the more efficient enforcers rests mostly on class action lawyers' willingness to sue regardless of any other considerations. That is not efficient; it is opportunistic. And nowhere is this opportunism more evident than in Respondents' elaborate attempts to belittle and even disenfranchise app developers. *See* Resp. Br. 40 n.17 (advancing a merits argument against developer claims). None of this is allowed by *Illinois Brick*. There is no "next best plaintiff" theory that permits indirect purchasers to secure their own standing by undermining the claims of those who first bear an alleged overcharge.

Respondents' disregard for precedent reaches its apex with their final argument, which consists of a series of merits attacks on Apple's policies to support

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[9] This is public knowledge, since every platform publishes its commission structure. Microsoft's Windows Phone Store, Google Play, Facebook, and Amazon's mobile app platform all charge 30% commissions on paid apps. *See* Microsoft, App Developer Agreement (effective date May 23, 2018), https://docs.microsoft.com/en-us/legal/windows/agreements/app-developer-agreement; Google, Play Console Help: Transaction Fees, https://support.google.com/googleplay/android-developer/answer/112622?hl=en (last visited Oct. 19, 2018); Amazon, Amazon Developer Services Agreement, https://developer.amazon.com/support/legal/da (last updated Sept. 25, 2018); Facebook, Payment Terms, https://developers.facebook.com/policy/payments_terms/ (last updated Dec. 29, 2016).

the idea that a new electronic commerce exception "likely would not" expose other marketplaces "to the type of action respondents have brought here." *Id.* at 49. There is no credible argument that *Illinois Brick* exceptions should be doled out by courts on yet another case-by-case analysis, this one about how future plaintiffs would or would not take advantage of the new exception. The potential for abuse is plain enough here, where Respondents attack a historically innovative and successful app distribution system with an argument that Apple was a "monopolist" on the day of its entry.[10] Indeed, it is telling that none of Respondents' *amici* embrace their merits theory in any respect.[11] It is therefore not credible for Respondents to claim that the new, case-by-case *Illinois Brick* exception they advance would not be abused.

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[10] Respondents' case is ostensibly based on this Court's *Kodak* decision, which recognized that a single-brand "aftermarket" (e.g., Kodak copier parts, or iPhone apps) could be a relevant antitrust market in certain circumstances, but not in others. The key issue is whether consumers were exploited by restrictive aftermarket practices that they first learned of *after* they were "locked-in" to the defendant's product. 504 U.S. at 469-477. On the other hand, the entire Court agreed that there is no relevant aftermarket when the defendants restrictive practices were "generally known" in the marketplace before consumers were locked-in. 504 U.S. at 477 n.24 (majority opinion), *id.* at 492 (Scalia, J., dissenting). Here, there was never an "open" iOS app distribution system. It was "closed" from inception. So *Kodak* defeats rather than supports Respondents' claim.

[11] The Antitrust Scholars contradict it by saying that the "mobile app store market appears to be a duopoly occupied by Apple and Google," and that the smartphone market is "dominated" by *six* manufacturers. Antitrust Scholars Br. 13-14.

There is no rationale for this Court to create an electronic commerce exception to *Illinois Brick*.

CONCLUSION

Apple respectfully asks that the judgment of the court of appeals be reversed.

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No. 17-204

In the Supreme Court of the United States

APPLE INC., PETITIONER

v.

ROBERT PEPPER, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether respondents can seek treble damages under Section 4 of the Clayton Act, 15 U.S.C. 15, based on their claim that Apple has monopolized the distribution of iPhone apps, where respondents were injured by Apple's conduct only to the extent that third-party app developers passed on Apple's allegedly supracompetitive commission in setting the prices that respondents paid.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

The Court granted certiorari to consider whether respondent consumers can seek treble damages under Section 4 of the Clayton Act, 15 U.S.C. 15, based on their claim that Apple has monopolized the market for the distribution of iPhone apps. The Department of Justice has responsibility for enforcing federal competition laws and a strong interest in their correct application. The United States also has an interest in promoting sound private antitrust enforcement, which is an important supplement to the government's own antitrust enforcement efforts. At the Court's invitation, the United States filed a brief as amicus curiae at the petition stage of this case.

STATEMENT

Section 4 of the Clayton Act authorizes an award of treble damages to "any person who shall be injured in

his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. 15(a). In *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), this Court held that Section 4's treble-damages remedy is not available to a plaintiff who relies on a "pass-on theory" of injury—that is, an allegation that the antitrust violator unlawfully overcharged a third party, and that the third party then passed on the overcharge to the plaintiff. *Id.* at 736. This case concerns the application of that rule to a Section 4 suit brought by purchasers of iPhone apps who allege that Apple has unlawfully monopolized the market for iPhone app distribution.

1. Apple introduced the iPhone in 2007. Pet. App. 2a. Shortly thereafter, it launched the App Store, an electronic marketplace that allows users to download iPhone apps. *Ibid.* "[T]he phrase 'there's an app for that' is now part of the popular lexicon," as a vast array of kinds of apps are available. *Riley* v. *California*, 134 S. Ct. 2473, 2490 (2014). Millions of apps are currently available in the App Store. Pet. Br. 9; see Pet. App. 43a.

Apple itself created some of the apps available in the App Store, but most are developed by third parties. Pet. App. 2a. Each third-party developer chooses the price that will be charged for its app in the App Store, and most make those apps available for free. *Id.* at 2a, 26a. If a developer decides to charge a price, however, Apple takes a 30% commission on each sale. *Id.* at 2a-3a. Apple requires the developer of each app for which a price is charged to select a price "ending in 99 cents," *i.e.*, a price such as $1.99 or $2.99. Pet. Br. 9.

A user who purchases an app (or a license for an app) pays the full price to Apple. Pet. App. 2a-3a, 26a-27a.

Apple retains 30% of that amount and remits the balance to the developer. *Id.* at 3a, 26a.[1] Apple "informs [app] developers (but not its iPhone customers)" of the commission. *Id.* at 52a. Apple does not take ownership of apps created by third-party developers, but instead acts as the developers' agent and completes the sales on their behalf. *Id.* at 20a.

Apple intends the iPhone to be a "closed" system. Pet. App. 2a. Apple prohibits developers from selling iPhone apps directly to consumers, and from distributing apps through any channel other than the App Store. *Id.* at 3a. Apple also discourages iPhone users from installing apps obtained from other sources. *Ibid.*

2. Respondents are iPhone users who purchased apps through the App Store. Pet. App. 46a. In 2011, they filed this putative class action against Apple. *Id.* at 3a. Their operative complaint alleged that Apple had violated Section 2 of the Sherman Act, 15 U.S.C. 2, by monopolizing the market for the distribution of iPhone apps. Pet. App. 3a, 24a. Respondents further alleged that Apple's 30% commission is supracompetitive, and that they "have been injured by Apple's anticompetitive conduct because they paid more for their iPhone apps than they would have paid" in a market in which developers could distribute apps through other channels. *Id.* at 53a. Along with other relief, respondents seek to recover three times the amount of the alleged overcharges under Section 4 of the Clayton Act. *Id.* at 63a.

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[1] Because this case arises on a motion to dismiss, we describe the facts as alleged in respondents' complaint. Pet. App. 2a. To the extent the parties dispute what the complaint is fairly read to allege, we rely on the reading adopted by the district court and left undisturbed by the court of appeals. See Cert. Reply Br. 2-3.

The district court dismissed respondents' complaint, holding that their Section 4 claim is barred by *Illinois Brick*. Pet. App. 23a-37a. The court explained that, although respondents' allegations are somewhat unclear, their complaint "is fairly read to complain about a fee created by agreement" between Apple and third-party app developers, under which the developers agree "to pay Apple 30% from their own proceeds." *Id.* at 36a. Accordingly, the court observed, Apple's 30% commission is "borne *by the developers*" in the first instance and is then "passed-on to [users] as part of the purchase price" the developers set. *Ibid.* The court therefore held that respondents' damages claim rests on allegations of passed-on harm, which this Court disapproved in *Illinois Brick*. *Id.* at 36a-37a.

3. The court of appeals reversed. Pet. App. 1a-22a. As relevant here, the court held that respondents' claim is not barred by *Illinois Brick* because Apple functions as a distributor of iPhone apps. *Id.* at 13a-21a.

The court of appeals began by reviewing this Court's decisions in *Illinois Brick*; in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968); and in *Kansas* v. *UtiliCorp United Inc.*, 497 U.S. 199 (1990). Pet. App. 13a-17a. The court of appeals explained that, in both *Illinois Brick* and *Hanover Shoe*, "a monopolizing or price-fixing manufacturer sold or leased a product to an intermediate manufacturer at a supracompetitive price," and the intermediate manufacturer "used that product to create another product, which was ultimately sold to the consumer." *Id.* at 16a. The court similarly characterized *UtiliCorp* as a case in which "a monopolizing producer sold a product to a distributor at an allegedly supracompetitive price," and "[t]he distributor then sold the product to the consumer." *Ibid.* The

court read those decisions to establish a rule that consumers may not sue a "manufacturer or producer" with which they have no direct dealings, but may sue an "intermediary" with which they deal directly, whether that intermediary is an "intermediate manufacturer or [a] distributor." *Id.* at 17a.

Based on that understanding, the court of appeals framed the dispositive question in this case as "whether Apple is a manufacturer or producer, or whether it is a distributor." Pet. App. 17a. The court concluded that *Illinois Brick* does not bar respondents' suit because "Apple is a distributor of the iPhone apps, selling them directly to purchasers through its App Store." *Id.* at 21a.

The court of appeals identified several specific factors that did *not* affect its analysis. First, the court did not decide whether app developers could bring their own Section 4 suit seeking treble damages from Apple, based on the same allegedly supracompetitive commission that is at issue here. Pet. App. 20a. Second, the court did not rely on the fact that iPhone users pay Apple, "which then forwards the payment to the app developers." *Ibid.* The court explained that it would have reached the same result if users had paid the entire purchase price directly to developers, and developers had then separately paid Apple its commission. *Ibid.* Third, the court deemed it irrelevant that Apple receives a fixed commission, rather than "tak[ing] ownership of the apps and then sell[ing] them to buyers after adding a markup," as a traditional retailer would. *Ibid.* Fourth, the court considered it immaterial that the price for an app is determined "by the app developer" rather than by Apple. *Id.* at 21a.

The court of appeals thus "rest[ed] [its] analysis" solely on what the court perceived to be "the fundamental distinction between a manufacturer or producer, on the one hand, and a distributor, on the other." Pet. App. 21a. The court framed its holding in those terms, concluding that "[b]ecause Apple is a distributor, [respondents] have standing under *Illinois Brick*." *Ibid.* The court acknowledged that the Eighth Circuit had reached the opposite result in a case "closely resembling" this one. *Id.* at 18a (discussing *Campos* v. *Ticketmaster Corp.*, 140 F.3d 1166 (1998), cert. denied, 525 U.S. 1102 (1999)). The court "disagree[d] with the [Eighth Circuit] majority's analysis," however, and instead endorsed the *Campos* dissent. *Id.* at 19a.

SUMMARY OF ARGUMENT

Respondents purchased iPhone apps from the App Store and now seek treble damages from Apple under Section 4 of the Clayton Act, 15 U.S.C. 15. They contend that (1) Apple unlawfully monopolized distribution of iPhone apps; (2) Apple charges an unlawfully high commission on sales from the App Store; and (3) as a result, respondents overpaid for apps. The district court correctly dismissed respondents' complaint, and the court of appeals' contrary ruling should be reversed.

A. Relying in part on background principles of proximate causation, this Court has construed Section 4 not to allow either defendants or plaintiffs to invoke pass-on theories of damages liability. In *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968), the Court held that an antitrust defendant cannot reduce or eliminate its liability under Section 4 by showing that the plaintiff passed on some or all of an unlawful overcharge to its own customers. In *Illinois Brick Co.* v.

Illinois, 431 U.S. 720 (1977), the Court held that offensive use of pass-on analysis is likewise precluded as a basis for imposing Section 4 liability. The Court in *Illinois Brick* rejected, as non-cognizable under Section 4, the claims of plaintiffs who alleged that an antitrust violator had overcharged third parties, and that those intermediaries had passed on the overcharges to the plaintiffs. And in *Kansas* v. *UtiliCorp United Inc.*, 497 U.S. 199, 208 (1990), the Court declined to recognize an exception to the *Illinois Brick* rule in a case where the parties that were overcharged in the first instance were "regulated public utilities that pass[ed] on 100 percent of their costs to their customers."

B. Respondents' complaint does not state a valid treble-damages claim under Section 4 because it is premised on the same sort of pass-on allegations that this Court found insufficient in *Illinois Brick*. A consumer who chooses to buy an app from the App Store pays the purchase price and receives the app, but has no economic stake in the manner in which that money is divided between Apple and the developer. Respondents are injured by Apple's allegedly exorbitant commission only if, and to the extent that, developers seek to recover some or all of that commission by increasing the prices of their apps.

Respondents' suit thus depends on the premise that app developers have shifted to consumers some or all of the costs of Apple's commission, rather than pricing their apps at the same level they would choose if no commission (or a smaller, lawful commission) were charged. Respondents' claim of pass-through harm is not cognizable under this Court's precedents. An app *developer*, by contrast, could invoke Section 4 to seek three times the amount of Apple's alleged unlawful overcharge,

since the harm the developer suffers (receiving a lower percentage of the price at which its apps are sold) is not derivative of any injury suffered by a third party.

In holding that respondents' suit is cognizable under Section 4, the court of appeals emphasized that Apple functions as a "distributor" of apps in the App Store, rather than as a "manufacturer or producer." Pet. App. 21a. That analysis is unsound. Although the defendants in *Hanover Shoe*, *Illinois Brick*, and *UtiliCorp* were indeed manufacturers or producers, the Court did not identify their functional roles as the ground for its decisions. Rather, it disapproved both defensive and offensive uses of pass-on analysis as bases for determining Section 4 liability.

Because respondents' Section 4 claim is likewise premised on allegations of pass-on injury, it is likewise precluded, despite Apple's role as a distributor. Apple does not set the prices that will be charged to consumers, but instead acts as an agent for app developers, completing sales on the developers' behalf at prices the developers set. That difference is crucial because respondents are injured by Apple's allegedly unlawful commission only if, and to the extent that, developers have responded to Apple's overcharge by increasing the prices charged for their apps.

C. The Court in *Illinois Brick* distinguished between "direct purchaser[s]," who can invoke Section 4, and "indirect purchaser[s]," who cannot. *E.g.*, 431 U.S. at 726. Respondents contend that they qualify as "direct purchasers" under that framework because they purchased apps directly from Apple via the App Store. But the Court has not used the terms "direct purchaser" and "indirect purchaser" to establish an independent legal test. Rather, the Court has used the term

"direct purchaser" as shorthand for a party that bears an antitrust violator's unlawful overcharge in the first instance, and the term "indirect purchaser" as shorthand for a party that bears such an overcharge only to the extent it is passed on by others. See *id.* at 724-726.

A plaintiff whose alleged injury is derivative of harm done to another is not a "direct purchaser" under that analytic framework, even if the plaintiff had a direct contractual relationship with the alleged antitrust violator. Respondents' claim to direct-purchaser status is particularly weak because, although they purchased *apps* directly from Apple, they did not purchase the *app-distribution services* that Apple allegedly monopolized. Any injury they may have suffered is instead derivative of the harm done to the developers who did purchase (and allegedly were overcharged for) those services.

Respondents' suit illustrates the practical concerns that this Court has identified as potential adverse consequences of allowing pass-on damages claims. Because app developers could recover three times the amount of any unlawful overcharge under *Hanover Shoe*, even if some or all of that overcharge had been passed on to consumers, allowing consumers to sue as well would create an evident prospect of duplicative recovery. And conducting pass-on analysis would be particularly difficult in this case, since the prices that respondents paid were set by tens of thousands of different app developers, operating in diverse competitive environments.

ARGUMENT

This court of appeals erred in holding, based on Apple's status as a "distributor" of iPhone apps, that respondents may seek treble damages under Section 4 of the Clayton Act. Under this Court's decisions, Section 4 relief is not available to a plaintiff who relies on a "pass-

on theory" of injury, *i.e.*, an allegation that a third party responded to an alleged overcharge imposed upon it by increasing the price it charged to the plaintiff. See, *e.g.*, *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 736 (1977). Because respondents' claim of injury is predicated on such an allegation, their damages claim is not cognizable under Section 4.

SECTION 4 OF THE CLAYTON ACT DOES NOT AUTHORIZE DAMAGES CLAIMS THAT ARE PREMISED ON A THEORY OF PASSED-ON HARM

A. Under *Illinois Brick*, A Plaintiff Cannot State A Claim For Treble Damages Under Section 4 By Alleging That The Defendant Unlawfully Overcharged A Third Party Who In Turn Passed On The Overcharge To The Plaintiff

Section 4 of the Clayton Act states that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor * * * and shall recover threefold the damages by him sustained." 15 U.S.C. 15(a). "A literal reading of the statute is broad enough to encompass every harm that can be attributed directly or indirectly to the consequences of an antitrust violation." *Associated Gen. Contractors of Cal., Inc.* v. *California State Council of Carpenters*, 459 U.S. 519, 529 (1983). But this Court has found it "plain" that, when Congress enacted the Clayton Act, "Congress intended the Act to be construed in the light of its common-law background." *Id.* at 531, 535; see *id.* at 529-535.

Of particular relevance here, this Court has long construed Section 4 to incorporate background principles of proximate cause, including the principle that "'[t]he general tendency of the law, in regard to damages at least, is not to go beyond the first step.'" *Associated*

Gen. Contractors, 459 U.S. at 532, 534 (quoting *Southern Pac. Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533 (1918) (Holmes, J.)); *Hanover Shoe, Inc.* v. *United Shoe Mach. Corp.*, 392 U.S. 481, 490 n.8 (1968) (same); cf. *Holmes* v. *Securities Investor Prot. Corp.*, 503 U.S. 258, 271 (1992) (same for the treble-damages provision of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1964(c), which is modeled on Section 4 of the Clayton Act). In three decisions articulating what has come to be known as the *Illinois Brick* rule, this Court has construed Section 4 not to allow either plaintiffs or defendants to invoke pass-on theories of damages liability.

1. In *Hanover Shoe*, the Court rejected an asserted pass-on defense to a Section 4 action. In that case, a shoe manufacturer (Hanover) sued a manufacturer of shoe-making machines (United), alleging that United had monopolized the market and had overcharged Hanover for the use of its machines. 392 U.S. at 483-484. The district court agreed and awarded Hanover three times the amount of the overcharge. *Id.* at 487. In this Court, United argued that Hanover had not been "injured in [its] business or property," 15 U.S.C. 15(a), because it had passed on the overcharge to its customers by increasing "the price charged for shoes." *Hanover Shoe*, 392 U.S. at 487-488. The Court rejected that defense as a matter of law, holding that a plaintiff that has been unlawfully overcharged by an antitrust violator "is equally entitled to damages" even if it has passed on the overcharge to its own customers. *Id.* at 489. The Court identified two practical justifications for that holding.

First, the Court believed that establishing the extent to which a plaintiff had passed on the defendant's over-

charge would normally entail "insurmountable" problems of proof and would often impede the resolution of treble-damages actions with "massive evidence and complicated theories." *Hanover Shoe*, 392 U.S. at 493. The Court stated that "[a] wide range of factors influence a company's pricing policies," and that it would be difficult or impossible to determine whether a plaintiff had raised its prices because of the defendant's overcharge or for other reasons. *Id.* at 492. The Court also expressed the view that it would be "[e]qually difficult to determine" the extent to which such a price increase had been offset by a reduction in the plaintiff's sales. *Id.* at 493.

Second, the Court believed that permitting pass-on defenses would "substantially reduce[]" the deterrent effect of treble-damages suits. *Hanover Shoe*, 392 U.S. at 494. The Court recognized that, as a practical matter, the economic burden of an antitrust violation will often be borne by the "ultimate consumers" in the distribution chain—in *Hanover Shoe*, consumers who had bought "single pairs of shoes." *Ibid.* While acknowledging that those consumers in the aggregate might ultimately bear the brunt of the overcharge, the Court was concerned that each consumer would have "only a tiny stake in a lawsuit and little interest in attempting a class action." *Ibid.*

The *Hanover Shoe* Court viewed the Section 4 rule that it articulated—prohibiting inquiry into whether the plaintiff had passed on all or part of an overcharge to its own downstream customers—as consistent with the Court's earlier decisions. The Court stated that, "[f]undamentally, this is the view stated by Mr. Justice Holmes in" *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U.S. 390 (1906). *Hanover Shoe*, 392 U.S.

at 489. In that case, Atlanta had operated a water-supply system that charged customers for water, and it had "sued the defendants for treble damages for anti-trust violations in connection with the city's purchases of pipe for its waterworks system." *Ibid.* Although Atlanta had presumably recouped at least part of the overcharge by increasing its prices, "[t]he Court affirmed a judgment in favor of the city for an amount measured by the difference between the price paid and what the market or fair price would have been had the sellers not combined," *i.e.*, the amount of the overcharge. *Id.* at 489-490. Although the measure of damages was not disputed on appeal, the Court addressed the issue, stating that Atlanta "was injured in its property, at least, if not in its business of furnishing water, by being led to pay more than the worth of the pipe. A person whose property is diminished by a payment of money wrongfully induced is injured in his property." *Id.* at 490 (quoting *Chattanooga Foundry*, 203 U.S. at 396).

The *Hanover Shoe* Court further observed that Justice Holmes had expressed "similar views" in *Southern Pacific*. *Hanover Shoe*, 392 U.S. at 490. *Southern Pacific* was a treble-damages case under the Interstate Commerce Act of 1887, ch. 104, § 8, 24 Stat. 382, brought by shippers who contended that a railroad had overcharged them. The railroad argued that "the shippers should not recover because they were able to pass on to their customers the damage they sustained by paying the charge." *Hanover Shoe*, 392 U.S. at 490 n.8 (describing *Southern Pacific*). The *Southern Pacific* Court rejected that contention. In the course of its analysis, the Court stated:

> The general tendency of the law, in regard to damages at least, is not to go beyond the first step. As it

> does not attribute remote consequences to a defendant so it holds him liable if proximately the plaintiff has suffered a loss. The plaintiffs suffered losses to the amount of the verdict when they paid. Their claim accrued at once in the theory of the law and it does not inquire into later events.

Ibid. (quoting *Southern Pacific*, 245 U.S. at 533-534).[2]

2. In *Illinois Brick*, the Court held that antitrust plaintiffs, as well as defendants, are barred from asserting pass-on theories of damages under Section 4. Illinois and a group of local governments sued manufacturers of concrete blocks, alleging that the defendants had fixed the prices charged to contractors, which in turn had passed on the overcharge to government entities in setting prices for construction work. 431 U.S. at 726-727. This Court held that, just as "a pass-on theory may

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[2] In various statutory contexts, this Court has continued to quote the "first step" language derived from *Southern Pacific*, and to reject the damages claims of plaintiffs whose alleged injuries are wholly derivative of harms done to others. *E.g.*, *Bank of Am. Corp.* v. *City of Miami*, 137 S. Ct. 1296, 1306 (2017); *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 134 S. Ct. 1377, 1394 (2014); *Hemi Grp., LLC* v. *City of New York*, 559 U.S. 1, 10 (2010). In *Holmes*, for example, an insurer for broker-dealers sued for treble damages under RICO on the theory that the defendant's stock-manipulation conspiracy had rendered the broker-dealers insolvent and had thereby required the insurer to cover their liabilities. See 503 U.S. at 271. The Court held that the suit could not go forward, explaining that, under the common law, "a plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts was generally said to stand at too remote a distance to recover." *Id.* at 268-269. The Court applied that rule to bar the insurer's claim for damages, quoting the "first step" language from *Southern Pacific* and explaining that the insurer's economic loss was "purely contingent on the harm suffered by the broker-dealers." *Id.* at 271.

not be used defensively by an antitrust violator" to reduce damages owed to a "direct purchaser plaintiff," such a theory may not be "used offensively by an indirect purchaser plaintiff" who alleges that it was overcharged when the violator's supracompetitive prices were passed on by third parties like the contractors in that case. *Id.* at 726; see *id.* at 736.

The *Illinois Brick* Court described *Hanover Shoe* as holding that "a direct purchaser suing for treble damages under § 4 of the Clayton Act is injured within the meaning of § 4 by the full amount of the overcharge paid by it," and that a defendant "is not permitted to introduce evidence that indirect purchasers were in fact injured by the illegal overcharge" because the direct purchaser passed it on by increasing its own price. *Illinois Brick*, 431 U.S. at 724-725. The Court then held that a plaintiff is similarly barred from predicating a Section 4 claim on an allegation that unlawful overcharges were passed on to it. The Court explained that "allowing offensive but not defensive use of pass-on would create a serious risk of multiple liability for defendants," who could be held liable to both direct and indirect purchasers for the same overcharge. *Id.* at 730. The Court added that the "principal basis" for its decision in *Hanover Shoe* had been the desire to avoid pass-on inquiries that would "greatly complicate and reduce the effectiveness of already protracted treble damages proceedings." *Id.* at 731-732. The Court concluded that this concern "applies with no less force to the assertion of pass-on theories by plaintiffs than it does to the assertion by defendants." *Id.* at 732.

Having held that offensive and defensive uses of pass-on harm should stand or fall together, the Court

stated that the *Illinois Brick* plaintiffs could not "recover on their pass-on theory" unless the Court "overrule[d] *Hanover Shoe*." 431 U.S. at 736. The Court declined to do so. The Court stated that "[p]ermitting the use of pass-on theories under § 4 essentially would transform treble-damages actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge," ranging "from direct purchasers to middlemen to ultimate consumers." *Id.* at 737. The Court concluded that, "[h]owever appealing this attempt to allocate the overcharge might seem in theory, it would add whole new dimensions of complexity to treble-damages suits." *Ibid.*

3. In *Kansas* v. *UtiliCorp United Inc.*, 497 U.S. 199 (1990), public utilities sued natural-gas producers and a natural-gas pipeline company, alleging that those entities "had conspired to inflate the price of their gas in violation of the antitrust laws." *Id.* at 204. Kansas and Missouri sued the same defendants on behalf of residents who had purchased gas from the utilities, alleging that the utilities had passed on the overcharges by increasing their state-regulated gas prices. *Id.* at 204-205. The States argued that the Court should recognize an exception to the *Illinois Brick* rule for cases "involving regulated public utilities that pass on 100 percent of their costs to their customers." *Id.* at 208.

This Court declined to create that exception. It acknowledged that "[t]he rationales underlying *Hanover Shoe* and *Illinois Brick* will not apply with equal force in all cases," and that establishing the extent to which a direct purchaser has passed on an overcharge may be easier in some circumstances than in others. *UtiliCorp*, 497 U.S. at 216. The Court declined, however, to "carve out exceptions" for "particular types of

markets." *Ibid.* (quoting *Illinois Brick*, 431 U.S. at 744). The Court explained that "[t]he possibility of allowing an exception, even in rather meritorious circumstances, would undermine the rule," *ibid.*, because the "process of classifying various market situations according to the amount of pass-on likely to be involved and its susceptibility to proof in a judicial forum would entail the very problems" that the *Illinois Brick* rule was intended to avoid, *ibid.* (quoting *Illinois Brick*, 431 U.S. at 744-745).[3]

4. Although *Illinois Brick* bars both offensive and defensive uses of pass-on in treble-damages suits under Section 4, the rule is limited in two important respects.

First, the *Illinois Brick* rule does not apply to suits seeking injunctive relief under Section 16 of the Clayton Act, 15 U.S.C. 26. This Court's decisions disapproving the use of pass-on approaches to damages liability under Section 4 do not speak to whether particular conduct by defendants violates the antitrust laws; they are instead rooted in concerns specific to monetary relief. See *Hanover Shoe*, 392 U.S. at 490 n.8 (quoting Justice Holmes's description of the rule for recovering damages);

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[3] This Court has left open the possibility that exceptions to the *Illinois Brick* rule might be appropriate in certain narrow circumstances. Those include cases in which "the direct purchaser is owned or controlled by its customer," and cases where a preexisting cost-plus contract ensures that "the purchaser is insulated from any decrease in its sales as a result of attempting to pass on the overcharge." *Illinois Brick*, 431 U.S. at 736 & n.16; see *UtiliCorp*, 497 U.S. at 217-218. The United States and the Federal Trade Commission (FTC) have also advocated that the *Illinois Brick* rule should not apply in some situations governed by the Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. 6a. See U.S. & FTC Amicus Br. at 6, *Motorola Mobility LLC* v. *AU Optronics Corp.*, 775 F.3d 816 (7th Cir. 2015) (No. 14-8003). Those potential exceptions are not at issue in this case.

see also *Associated Gen. Contractors*, 459 U.S. at 532 (discussing common-law rules that have traditionally "circumscribed the availability of damages recoveries"). And suits by indirect purchasers seeking only injunctive relief do not raise the same concerns about "duplicative recovery" or "the complexity of apportioning damages." *Cargill, Inc.* v. *Monfort of Colo., Inc.*, 479 U.S. 104, 111 n.6 (1986); see, *e.g.*, *Campos* v. *Ticketmaster Corp.*, 140 F.3d 1166, 1172 (8th Cir. 1998), cert. denied, 525 U.S. 1102 (1999); *McCarthy* v. *Recordex Serv., Inc.*, 80 F.3d 842, 856 (3d Cir.), cert. denied, 519 U.S. 825 (1996).[4]

Second, in the decades since *Illinois Brick* was decided, more than two-thirds of the States have authorized the use of pass-on analysis to apportion damages under their own antitrust laws, which otherwise generally parallel federal law. See Antitrust Modernization Comm'n, *Report and Recommendations* 268-269 (Apr. 2007) (*AMC Report*). This Court has held that those state laws are not preempted because the *Illinois Brick* rule "defin[es] what sort of recovery federal antitrust law authorizes" and does not "defin[e] what federal law allows States to do under their own antitrust law." *California* v. *ARC Am. Corp.*, 490 U.S. 93, 103 (1989).

The regime of parallel federal and state antitrust litigation has proved to be complex and inefficient, and

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[4] The district court dismissed respondents' complaint based on its holding that *Illinois Brick* bars their treble-damages claim. Pet. App. 37a. The complaint also includes a request for injunctive relief, *id.* at 63a, which respondents argued on appeal should be allowed to proceed even if their treble-damages claim cannot, Resps. C.A. Br. 53-54. The court of appeals had no occasion to address that argument, which will remain open on remand if this Court holds that *Illinois Brick* forecloses respondents' treble-damages claim.

some commentators have concluded that the evidentiary complexities associated with pass-on analysis are not as great as this Court believed them to be. See *AMC Report* 268-272; 2A Phillip E. Areeda et al., *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 346k, at 219-227 (4th ed. 2014). The parties have not asked the Court to revisit *Illinois Brick* or *Hanover Shoe*, however, and the only question presented is how to apply those precedents here.

B. *Illinois Brick* Bars Respondents' Treble-Damages Claim Because That Claim Depends On Allegations That Third-Party App Developers Passed On All Or Part Of Apple's Alleged Unlawful Overcharge

1. Respondents allege that Apple monopolized the "distribution market for iPhone apps." Pet. App. 56a. They further allege that they "have been injured by Apple's anticompetitive conduct because they paid more for their iPhone apps than they would have paid" if developers had been allowed to sell their apps through other channels. *Id.* at 53a. According to respondents, the availability of alternative distribution channels would have forced Apple "to substantially lower its 30% [commission]," which would have led to lower app prices. *Id.* at 55a. As the district court explained, respondents' complaint is "fairly read to complain about a fee * * * borne *by the developers* to pay Apple 30% from their own proceeds—an amount which is passed-on to the consumers as part of the purchase price." *Id.* at 36a.

a. Respondents' complaint does not state a valid treble-damages claim under Section 4 because it is premised on the same sort of pass-on allegations that this Court found non-cognizable in *Illinois Brick*. A consumer who pays (for example) $6.99 for an app in the App Store has no economic stake in how that price is

divided between Apple and the developer. If Apple's 30% commission is excessive, the resulting economic loss is borne most immediately by the developer, whose receipts from the sale are reduced by 30% in every case. Consumers are injured by Apple's allegedly exorbitant commission only if, and to the extent that, developers seek to recoup some or all of that commission by setting app prices at higher levels than they otherwise would.

Under Apple's pricing system, an app developer's choice of the price to be charged for a particular app dictates the exact amount of money that the purchaser will pay; the exact amount of money that the developer will receive; and the exact amount of the commission that Apple will retain. For example, when a developer that would otherwise price its app at $6.99 confronts Apple's 30% commission, it can leave the price at $6.99, preserving sales volume but absorbing the entire commission ($2.10) itself and receiving $4.89 on each app sold. It can increase the price to $9.99, passing on the full amount of the commission ($3.00) to the customer and receiving $6.99 per app but likely losing sales. Or it can charge a price between $6.99 and $9.99, thereby passing on to consumers some but not all of the cost of Apple's commission. Respondents' claim of injury depends on the premise that the developers of the apps they purchased chose the second or third option, and that respondents paid more for apps as a result. That is precisely the sort of pass-on claim that this Court has found insufficient to support damages relief under Section 4.

b. An app *developer*, by contrast, could show injury from an unlawfully high commission without relying on any similar pass-on analysis. Most obviously, a developer that prices its app at $6.99 receives $2.10 less per

app sold than it would receive if Apple charged no commission (and, for example, receives $1.40 less per app under the 30% commission than it would receive if Apple instead charged a 10% commission). That injury is the immediate result of the allegedly exorbitant commission, and it is not derivative of any harm done to a third party. The developer loses 30% of the receipts from each sale, regardless of the price that it selects.

To be sure, if Apple eliminated its commission on apps sold in the App Store, many developers might reduce their prices in an attempt to increase sales volume, rather than maintaining their prices at (for example) $6.99 and receiving $2.10 more on each app sold. A particular developer presumably would choose that course if it believed that doing so would increase its total profits. The statement that app developers might decrease their prices if Apple lowered its commission, however, is simply another way of saying that app developers may pass on to consumers some or all of the commission that Apple actually charges. Under *Hanover Shoe*, that possibility would not prevent the developer from recovering three times the full amount of an unlawful overcharge.[5]

2. The court of appeals "rest[ed] [its] analysis" on what it called "the fundamental distinction between a manufacturer or producer, on the one hand, and a distributor, on the other." Pet. App. 21a. The court held that respondents' Section 4 suit may proceed "[b]ecause

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[5] Apple's imposition of an exorbitant commission, moreover, would be expected to cause *some* economic harm to each app developer, regardless of what pricing decision the developer made in response. Even if the developer increased its price by an amount sufficient to pass on to consumers the full amount of the overcharge, it would expect to lose sales volume (and thus a portion of the revenues it would otherwise receive) as a result.

Apple is a distributor" that sold iPhone apps "directly" to respondents. *Ibid.* That holding reflects a misunderstanding of the *Illinois Brick* rule.

The court of appeals observed that *Hanover Shoe*, *Illinois Brick*, and *UtiliCorp* all involved similar supply chains, through which a manufacturer or producer sold or leased a product to an intermediate manufacturer or distributor, which either resold that product or used it to make the product that was sold to consumers (sometimes through other intermediaries). Pet. App. 16a. In *Hanover Shoe*, United leased shoe-making machines to Hanover, which used them to make shoes that were ultimately sold to retail customers. 392 U.S. at 483-484. In *Illinois Brick*, manufacturers of concrete blocks sold them to contractors, who used the blocks in construction for Illinois and its local governments. 431 U.S. at 726. In *UtiliCorp*, the natural-gas producers and pipeline company sold gas to utilities, which resold it to consumers. 497 U.S. at 204.

The court of appeals correctly recognized that, under this Court's decisions, the ultimate consumers in those three distribution chains could not bring Section 4 actions against the original manufacturers or producers, but could have sued the intermediate manufacturers or distributors with which they transacted if those intermediaries had violated the antitrust laws. Pet. App. 16a-17a. In *Illinois Brick*, for example, Illinois could not sue the allegedly price-fixing manufacturers of concrete blocks, but it could have sued the general contractors if those contractors had conspired to fix the prices they charged the State for construction work.

The court of appeals went astray, however, in attempting to derive the governing legal rule from the facts of *Hanover Shoe*, *Illinois Brick*, and *UtiliCorp*,

rather than from the rationale for this Court's holdings. As explained above, the Court's rationale rested on its rejection of pass-on claims, whether asserted offensively (by plaintiffs to recover damages for passed-on costs) or defensively (by defendants to avoid damages that the plaintiffs had passed on to their customers). In *Hanover Shoe*, the Court held that a Section 4 defendant is "not entitled to assert a passing-on defense." 392 U.S. at 494. In *Illinois Brick*, the Court again framed the question presented as concerning the "permissibility of pass-on arguments," 431 U.S. at 731, and it extended *Hanover Shoe* to bar "the use of pass-on theories by plaintiffs" as well as by defendants, *id.* at 737; see, *e.g.*, *id.* at 732, 745, 747; cf. *Holmes*, 503 U.S. at 271-272.

In *Hanover Shoe*, *Illinois Brick*, and *UtiliCorp*, the consumers would not have needed to use pass-on arguments in suits against the distributors or other intermediaries with which they transacted because those intermediaries set the prices the consumers paid. This case is different. Although Apple acts as an intermediary or distributor, it does not buy apps from app developers and then resell them to consumers at prices of its own choosing. Pet. App. 20a. Instead, it acts as an agent for the developers, completing sales on the developers' behalf at prices the developers set. *Id.* at 20a-21a, 36a.

That difference is critical when applying the *Illinois Brick* rule here. In and of itself, Apple's retention of an unduly large portion of the App Store price would have no economic impact on a consumer who had paid that price. Rather, respondents' claim of injury depends on the assertion that developers responded to Apple's allegedly unlawful commission by setting prices at levels higher than the developers otherwise would have chosen. That is at bottom an allegation of pass-on injury,

even though Apple acts as an intermediary between app developers and consumers and has contractual relationships with both. Accordingly, to prove damages, respondents would need to establish the extent to which Apple's allegedly unlawful practices have caused developers to set higher prices for their apps than they otherwise would have. That is precisely the pass-on inquiry this Court has disapproved. See *Illinois Brick*, 431 U.S. at 737, 743; *Hanover Shoe*, 392 U.S. at 492-493.

C. Respondents Are Not "Direct Purchasers" In The Sense In Which The *Illinois Brick* Court Used That Term

At the certiorari stage, respondents argued that they qualify as "direct purchasers" under *Illinois Brick* because they bought iPhone apps "directly" from Apple. Pet. App. 21a-22a; see Br. in Opp. i, 6, 11. That argument lacks merit. It is true that, unlike the plaintiffs in *Illinois Brick*, respondents purchased apps directly from Apple and thus were in privity of contract with the alleged antitrust violator. As the Court used the terms in *Illinois Brick*, however, the distinction between "indirect" and "direct" purchasers depends on whether a particular buyer's claim of harm from allegedly unlawful practices depends on pass-on arguments. Respondents' claimed injury is derivative of harm done to app developers, since a consumer pays more for an app only if the developer has increased the price it would otherwise set in order to mitigate its own harm from Apple's commission. Respondents therefore are "indirect purchasers" in the sense that is relevant here.

1. Because the terms "direct purchaser" and "indirect purchaser" do not appear in the Clayton Act, the analysis here should focus on the manner in which the Court has used those terms in its Section 4 decisions, not on those terms' common or ordinary meaning. Cf.

Associated Gen. Contractors, 459 U.S. at 536 n.33 (noting that focusing on "directness" or other labels "may lead to contradictory and inconsistent results"). In *Illinois Brick* and *UtiliCorp*, the Court did not use those terms to supply an independent legal test. Rather, the Court used the term "direct purchaser" to describe a party whose economic loss from an unlawful overcharge is not derivative of any other actor's injury, and the term "indirect purchaser" to describe a party that bears such an overcharge only to the extent it is passed on by others. *E.g.*, *UtiliCorp*, 497 U.S. at 206-208; *Illinois Brick*, 431 U.S. at 724-726. The Court has consistently focused on the intervening step of an independent third party's decisionmaking, evidentiary complexities, and on other problems associated with pass-on analysis—not on "directness" in any other sense. Indeed, the Court's opinion in *Hanover Shoe*—the precursor to *Illinois Brick*—did not use the terms "direct purchaser" and "indirect purchaser" at all, much less correlate them to particular roles like "manufacturer" or "distributor."

Even as a matter of common parlance, moreover, respondents would not naturally be characterized as "direct purchasers" in the specific market that Apple allegedly monopolized. Respondents alleged that Apple has monopolized the "distribution market for iPhone applications," by requiring developers to use the App Store in order to make their apps available, then taking a 30% cut of whatever price the developer sets. Pet. App. 36a, 41a. With respect to that allegation, respondents' claim to direct-purchaser status is particularly weak because, although respondents have purchased *apps* directly from Apple, they have not purchased the *app-distribution services* that Apple allegedly monopo-

lized. The benefit that consumers derive from the allegedly monopolized services is contingent on the independent decisions of app developers to utilize those services to distribute apps that consumers find desirable (*i.e.*, to make their apps available in the App Store).

This case is thus analogous to *Hanover Shoe*. Just as shoe-making machines were a "necessary input" for Hanover and other shoe manufacturers, *Campos*, 140 F.3d at 1171, distribution services are a necessary input for app developers' sales of their apps to the public. If, as respondents allege, Apple has monopolized the market for distribution services, the immediate consequence is that developers cannot obtain those services elsewhere and must instead acquire them on Apple's terms—by agreeing to pay Apple's 30% commission. That commission immediately harms developers, who at best can mitigate the harm by raising prices at the cost of losing sales. By contrast, respondent consumers' claims are derivative of the harm to third-party developers, because consumers pay higher prices for apps only to the extent that developers choose to pass on all or part of Apple's commission by setting higher app prices than they otherwise would. See pp. 19-20, *supra*. This Court's decisions prohibit the use of such pass-on claims in treble-damages suits under Section 4.

2. In its decisions establishing and applying the rule against pass-on claims under Section 4, this Court has noted "the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other." *Associated Gen. Contractors*, 459 U.S. at 544; see *Illinois Brick*, 431 U.S. at 730-731. Respondents' suit illustrates those concerns.

a. As discussed above, see pp. 20-21, *supra*, a developer who raised the same allegations that respondents

make here would be a proper plaintiff under Section 4. Allowing consumers *also* to sue, however, would create an evident risk of duplicative recoveries under the Clayton Act. Forcing developers and consumers to fight for "a piece of the same 30% pie" (Br. in Opp. 12) would mitigate that risk. Under *Hanover Shoe*, however, a plaintiff app developer would be entitled to recover three times the amount of any unlawful overcharge, even if it had passed on all or part of that overcharge by raising the price of its app in the App Store. In any event, no app developer is a member of the class here or otherwise a party to this suit, and respondents identify no existing procedural mechanism that would bind all nonparty developers to use the same pass-on analysis as would be used here. Rather, if they were to sue, nonparty developers could "assert conflicting claims to a common fund—the amount of the alleged overcharge—by contending that the entire overcharge was absorbed at that particular level in the chain." *Illinois Brick*, 431 U.S. at 737.

b. Any pass-on analysis here would be substantially more complex than the pass-on analyses the Court disapproved in *Hanover Shoe*, *Illinois Brick*, and *UtiliCorp*. Respondents' claim of pass-on harm depends on the contention that app developers would have set lower prices in the App Store if Apple had charged a lower (or no) commission. But there is no basis for assuming that tens of thousands of developers would all have responded in the same way if Apple had lowered its commission to a particular level. Indeed, the likelihood that different third-party app developers reacted to the commission in different ways is heightened by the fact that different apps compete in very different markets. An

"app[] for improving your romantic life," *Riley* v. *California*, 134 S. Ct. 2473, 2490 (2014), for example, may compete with other such apps, and may compete as well with matchmaking services or the like in the broader economy. Such an app would not compete, however, with "apps for planning your budget" or "apps for tracking pregnancy symptoms." *Ibid.* Respondents' claims thus would effectively require a court to engage in myriad pass-on analyses to resolve a single suit.

For the foregoing reasons, respondents are not properly viewed as "direct purchasers" within the meaning of *Illinois Brick*. The Court in *Illinois Brick* used that phrase not to supply a legal test, but instead as a shorthand description of purchasers whose claims of injury are not derivative of harms done to other parties. Respondents' suit for treble damages is predicated on the very pass-on analysis the Court found to be impermissible in *Illinois Brick* and *Hanover Shoe*, as their claim of injury depends on how independent third parties responded to Apple's challenged practices. And although respondents purchased apps directly from Apple, they did not purchase the distribution services that Apple has allegedly monopolized. Allowing respondents' suit to proceed would also give rise to the practical concerns that this Court has associated with both offensive and defensive uses of pass-on analysis. The district court was therefore correct in holding that respondents' claims are not cognizable under Section 4, and the court of appeals' contrary ruling should be reversed.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded for further proceedings consistent with this Court's opinion.

Respectfully submitted.

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No. 17-204

IN THE

Supreme Court of the United States

APPLE INC.,

Petitioner,

v.

ROBERT PEPPER, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INTEREST OF *AMICUS CURIAE*[1]

ACT | The App Association ("App Association") is an international grassroots advocacy and education organization representing more than 5,000 small app developers and technology firms in the digital economy. It is the only organization focused on the needs of small business innovators from around the world. The App Association advocates for an environment that inspires and rewards innovation while giving resources to help its members leverage their intellectual assets to raise capital, create jobs, and continue innovating.

The App Association has participated as an *amicus curiae* in the Supreme Court and other courts in cases related to antitrust and technological innovation. *See, e.g., Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014); *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003); *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc) (per curiam). Technological innovation plays a critical role in enhancing competition and improving the welfare of consumers; therefore, the App Association has a keen interest in ensuring courts properly apply federal antitrust law to the dynamic industries and innovative technologies that drive the app ecosystem. The App Association's members rely on app platforms give innovative products and services to

1. Pursuant to Rule 37.6, amicus affirms that no counsel for a party authored this brief in whole or in part and that no person other than amicus and its counsel made a monetary contribution to its preparation or submission. Both parties have consented to the filing of this brief.

billions of consumers in the United States and around the globe. If the Ninth Circuit's ruling stands, it will directly affect the viability of app platforms, as well as developers' ability to give services.

SUMMARY OF ARGUMENT

ACT | The App Association ("the App Association") urges the Court to overturn the Ninth Circuit's decision in this case on the basis that Respondent's case relies on the misguided assumption that they are direct purchasers of Petitioners. As an association that represents actual developers who rely on platforms such as the Petitioner's App Store, we find the Respondent's characterization of the relationship between platforms and app developers to be factually inaccurate and disingenuously self-serving, especially their blatant disregard for how our members structure their pricing for their innovative products.

Today, the app economy represents $568.47 billion of the United States' economy and has 317,673 companies active in the U.S.'s mobile app market; the app economy is also responsible for creating 5,744,481 American jobs. The App Association has long believed that agency-sale relationships are procompetitive arrangements that lower costs for consumers and has contributed to the app economy's success. The agency-sale approach gives independent app developers autonomy and flexibility in how they offer their apps to consumers, whether it be free with in-app purchases, subscription-based sales, one-time purchase, etc. *See* App Store Guidelines. Successful app platforms, like Petitioner's App Store, have revolutionized the app ecosystem by providing app developers with eased access to a much broader swath of consumers and

platform users, resulting in a flourishing app economy that has enabled our members to grow and create 4.7 million American jobs. *See* Roya Stephens & Adarsh Mahesh, *State of the App Economy*, ACT | The App Association (2018) Available at: http://actonline.org/wp-content/uploads/ACT_2018-State-of-the-App-Economy-Report_4.pdf. The App Association implores courts and lawmakers to avoid disrupting the symbiotic and pro-consumer relationship that exists between app developers and app platforms.

In the instant case, the Ninth Circuit completely ignored how our members interact with various mobile platforms by suggesting that Petitioner owns and controls the relationship with our members' customers. This implies that platforms serve more as resellers of apps it hosts on its platform and, thus, allows them to dictate the price of those apps to consumers. To assist this Court, we explain and explore the realities of the relationship between app developers and app platforms. Additionally, we examine the net effects on American consumers; and why, ultimately, the Ninth Circuit's interpretation of this relationship, at the core of the matter at hand, is misguided and, if upheld, could damage and disrupt an ecosystem that has demonstrated significant societal value.

Moreover, the Ninth Circuit's interpretation of consumers as direct buyers from the Petitioner incorrectly assumes the Petitioner has ownership rights in app developers' apps. To draw this conclusion, the Ninth Circuit relies on its misunderstanding of the agency-sale relationship app developers have with platform owners. In reality, the Petitioner is only entitled to the agreed upon percentage of the app developers' app fee. Aside

from this fee, the Petitioner has no ownership rights to the app. In addition, app developers can offer their apps on platforms not owned by the Petitioner, unencumbered by the Petitioner. All creative rights solely belong to the app developer and are uninhibited by the Petitioner. Moreover, when a consumer agrees to the "terms of service" for each app he or she buys, the app's developer keeps sole responsibility for any breach of those terms. App developers are also solely responsible for any disruption in their service because of a lack of integrity in their code, and the onus is on them to fix it. Thus, the Ninth Circuit appears to be confused as to what or from whom the consumer is buying when they purchase an app. By any estimation, it is clear that the consumer is the app developer's customer, not the platform's.

The Ninth Circuit also is indifferent as to who sets the prices of apps. Again, this point is undisputed from our perspective: the app developer sets this price. The Petitioner is not making app developers set a price for the consumers who purchase their apps through the App Store platform, which is categorically inaccurate. Moreover, this interpretation, in effect, misappropriates and confuses who pays for what in the app economy, which is precisely what *Illinois Brick* sought to prevent from happening.

At the heart of the *Illinois Brick* doctrine, this Court expressed concern of indirect purchasers taking issue with upstream negotiations and providing indirect purchasers the ability to object to the negotiated price from upstream agreements to which they were not a party. Central in an *Illinois Brick* analysis is examining where the direct contractual relationship exists; put another way: who is selling to whom. As a result, for purposes of

antitrust standing, people or entities can only sue those companies that have direct control over the product and its pricing.

For these reasons, we respectfully request the Court overturn the Ninth Circuit's decision in this case.

ARGUMENT

I. The Ninth Circuit Factually Ignoring the Procompetitive Agency-Sale Relationship App Developers Have with App Stores Fatally Skews its Reasoning and Conclusions

The app ecosystem has developed alongside the rise of the smartphone and has experienced substantial growth in its less than ten years of existence. Small-to-medium entities (SMEs) are leaders in the $950.6 billion app ecosystem that has revolutionized the software industry and influenced every sector of the economy, representing approximately 4.7 million American jobs. Roya Stevens & Adarsh Mahesh, *State of the App* Economy, ACT | The App Association (2018) at http://actonline.org/wp-content/uploads/ ACT_2018-State-of-the-App-Economy-Report_4.pdf (App Economy Report). To facilitate the rise of the internet of things (IoT)[2], trusted and curated app stores will be vital to providing the apps that serve as the interface for IoT devices. The opportunities and potential for IoT will hinge on the app economy's continued innovation, investment, and growth.

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2. IoT is an encompassing concept where everyday products use the internet to share data collected from sensors, enabling greater efficiency in processes, products, and services across every sector.

The App Association has long believed, and our experience for over a decade demonstrates, that agency-sale relationships are procompetitive arrangements that lower costs for consumers in the context of software apps. Brief for ACT | The App Association as Amicus Curiae, p. 11, *Apple, Inc, v. U.S.*, Case No. 15-565 (2015). The agency-sale approach gives independent app developers autonomy and flexibility in how they offer their apps to consumers, whether it be free with in-app purchases, subscription-based sales, one-time purchase, etc. *See* App Store Guidelines. Successful app platforms, like Petitioner's App Store, have changed the app ecosystem, which provides app developers with ubiquitous access to a far broader swath of consumers and platform users worldwide than could be reached through the sole efforts of the developer. This scenario has led to a flourishing app economy that has benefited our members and consumers both. Chuck Jones, *Apple's App Store Generating Meaningful Revenue*, FORBES (Jan. 6, 2017, 2:10 PM), https://www.forbes.com/sites/chuckjones/2017/01/06/apples-app-store-generating-meaningful-revenue/#305d93011eb6 (reporting developers receiving $20 billion in revenue). The App Association implores courts and lawmakers not to disrupt the symbiotic relationship existing between these two entities.

In the instant case, the Ninth Circuit completely ignored how our members interact with various mobile platforms by suggesting that Petitioner owns and controls the relationship with our members' customers. This implies platforms serve more as resellers of apps it hosts on its platform and, thus, allows them to dictate the price of those apps to consumers. To assist this Court, we explain and explore the realities of the relationship between app developers and app platforms, and the net

effects on American consumers; and why, ultimately, the Ninth Circuit's interpretation of this relationship, at the core of the matter at hand, is misguided and, if upheld, could damage and disrupt an ecosystem that has demonstrated significant societal value.

A. The benefits of the symbiotic relationship between app developers and app platforms

The relationship between platforms and app companies is mutually beneficial, and one that should be fostered and supported. Not only do platforms provide app companies with secure market access, consumer trust, developer autonomy, dispute resolution, and meaningful consumer analytics; they provide a vital resource to bring the ingenuity and innovations of app companies to consumers around the globe. *See* App Economy Report. Further, the developer-platform partnership is procompetitive and lowers costs for consumers. These relationships provide app developers with a significant amount of disintermediation to reach consumers around the globe without having the developer forfeit the ability to control their business and pricing structure. *See* Deloitte, ***The App Economy of the United States: A Review of the Mobile App Market its Contribution to the United States***, Report (forthcoming 2018) (finding that "app stores do not set the prices of apps, this decision being the sole prerogative of developers") (Deloitte Study).

1. Platforms lower overhead costs that simplify market entry

Before centralized platforms, app developers were forced to absorb significant costs and manage various relationships to distribute their product to a wide

consumer base. *See* Timothy F. Bresnahan, Jason P. David, and Pai-Ling Yin, *Economic Value Creation in Mobile Applications*, UNIVERSITY OF CHICAGO PRESS (July 2015). Available at http://www.nber.org/chapters/c13044.pdf (writing "[t]he rapid growth of mobile devices has been accompanied by an equally rapid growth in app development, in substantial part because platform providers Apple and Google have lowered the costs of development and distribution of mobile applications."). Much more complex than a direct developer-consumer exchange, software companies used distributors to reach and engage with end users. Developers had to sacrifice valuable time from product development to establish relationships with distributors and were beholden to strict and costly rules even before they made their products available to consumers. Today, the app economy represents $568.47 billion of the United States' economy and has 317,673 companies active in the U.S.'s mobile app market; the app economy is also responsible for creating 5,744,481 American jobs. *See* Deloitte Study.

In simplest terms, independent software developers either paid to offload the overhead to a publisher or absorbed the cost and uncertainty of sales internally. These barriers to entry impacted hundreds of thousands of software developers and companies around the world; thus resulting in higher prices and fewer choices for consumers.

While the concept of mobile platforms existed in both BlackBerry and WindowsCE, it did not gather steam until 2008, when Petitioner paired its then-new iPhone with an integrated application storefront. Multiple companies quickly followed Petitioner's direction and launched stores

or marketplaces designed for various products. This created an entirely new internet-enabled economy that incorporated small businesses and reduced financial and temporal costs for developers.

As we alluded to earlier, software companies incurred an extraordinary financial burden to bring their products to market before the introduction of mobile platforms. For instance, they had to engage in costly and time-consuming marketing campaigns to establish consumer trust and contract others to process financial transactions for them. Adam Jaffe & Benjamin Jones, *The Changing Frontier: Rethinking Science and Innovation Policy*, National Bureau of Economic Research (2015) Available at https://books.google.com/books?id=QdopCwAAQBAJ&pg. Platforms have since created a one-stop shop that mitigates these costs so that more small businesses, like our members, can take part in the app economy. *See id.* At p. 238 (2015) (writing "[t]he rapid emergence of many demanders, together with the very low barriers of entry created by the platform providers, has led to a rapid and very substantial expansion in the number of overall apps.").

In the late '90s, a software company had to spend about $10 million just to get up and running. *See* TEDx Talks, The New Startup Economics: Stephen Forte at TEDxHKUST, Youtube (Apr. 2, 2013), https://www.youtube.com/watch? v=t4IiYEtJU_s.

Today, the advent of free or inexpensive cloud services, internet connectivity, and software tools have enabled small-business app developers to bring their innovative products to market with just a $100,000 check. *See id.*

Platforms help lower the barrier to entry for small app companies by shouldering the costs of privacy measures, security, and intellectual property protections for their users, thereby freeing up substantial amounts of capital that startups can use to build and grow their business.

With lower costs and barriers to entry, both fledgling and established app developers can succeed. For example, French educational app company L'Escapadou secured 1.3 million downloads and earned more than $1.5 million from app sales. Steve Young, *Making $1.5 Million with Educational Apps with Pierre Abel*, App Masters (Apr. 30, 2015) Available at: http://bit.ly/2hgDzZH. Founder Pierre Abel specialized the language, content, and pricing of each of his apps based on consumers and market needs and marketed them on different platforms to reach a variety of consumers around the world. L'Escapadou attributes its success to the centralized nature of platforms. *See id.*

This lower overhead is why the app economy is highly competitive and one of the most innovative spaces on the internet-enabled ecosystem. *See* Deloitte Study (finding a causal relationship between app developers' lowered overhead through the use of mobile platforms and the app economy's success). For example, Petitioner's App Store provides a service that eases financial transactions (such as billing to consumers) and provides consumers assurances that all the apps sold are compliant with relevant tax codes—something that software developers had to handle themselves. Popular platforms also may choose to absorb credit card fees to prevent them from transferring the cost to the developer. Without this platform-enabled service, it would fall on the app developer to handle each transaction; again, falling outside the bounds of an app developer's

core competencies which, at times, is almost exclusively limited to writing the code for their app.

2. Platforms give app developers instant access to international markets

Successful platforms, like Petitioner's App Store or Google Play, have changed the app ecosystem by providing app developers ubiquitous access to a broader swath of consumers. Platforms provide a centralized framework for app developers to engage and secure visibility with the 3.4 billion app users worldwide. Hugo Delgado, *The App Economy Forecast: A $6 Trillion Market in the Making*, App Annie (2017) Available at: http://bit.ly/2xfDqtB. For instance, Petitioner's App Store is available in 155 countries around the globe. Ketan Pratap, *Apple Says Developers Earned Over $70 Billion Since App Store's Launch*, Gadget 360 (Jun. 1, 2017) http://gadgets.ndtv.com/apps/news/apple-says-app-store-earned-developers-70-billion-since-launch-1706781. By Petitioner hosting an app company's product on its platform, that app company now has immediate access and reach to the same markets as Petitioner for a nominal fee without having to build a brick-and-mortar store or pay for an expensive an international ad campaign.

3. Before platforms, app developers struggled to build trust with end users

In the internet economy, end user trust – an established relationship between the app company and consumer where the consumer demonstrates confidence to disclose otherwise personal information to an app company – is extremely difficult to earn and maintain, especially

when a single incident (e.g., a breach or cyberattack) can permanently damage a business's trust easily with their customer. However, for a small business app developer, this event can easily spell death for their company. While brick-and-mortar retailers may be able to operate without the use of most of a customer's personal information, app companies need different types of personal information to develop and provide their innovative services to customers (e.g., geolocation data, financial information, health data). App companies are also different in that, without end user trust, consumers are unlikely to disclose essential information to an app company. Therefore, consumer trust and willingness to share information are critical for an app developer to succeed in the market, more so than for brick-and-mortar.

Even before the advent of digital commerce, consumer trust was a critical aspect of a software developer's ability to bring a product to market. Erik Brynjolfssn & Michael Smith, *Frictionless Commerce? A Comparison of Internet and Conventional Retailers*, MIT (1999) Available at: http://bit.ly/2yrEJ8W (writing "[r]ecent scholars have argued that trust is among the most important components of any effective Internet marketing program."). Prior to platforms, software developers often had to hand over their products to companies with a significant reputation to break through the trust barrier. Even "shareware" products that could be digitally distributed would end up partnering with trusted brands to gain consumer trust. Stew Chyou, *The History of Shareware*, Thunderbolt (May 5, 2011) Available at: http://bit.ly/2xvPuJ7. For example, in 1996, developers of the computer game *Ultimate Doom* contracted with Chex cereal to augment its consumer base. Developers converted their game software to create

the child-friendly game Chex Quest. *See id.* Today, most games, like *Ultimate Doom*, are free to download on platforms in app form like Petitioner's App Store, Google Play, or game-specific, independent platform Steam. These platforms not only lower cost but can reach consumers beyond those who buy a particular brand of cereal or trusted product. Now, platforms are the trusted product.

But the trust mechanism provided by the platforms is not merely an aspect of size. Consumer trust requires constant maintenance and vigilance because a loss of trust hurts platforms and the developers that depend on them. Zack Whittaker, *Millions of Steam game keys stolen after hacker breaches gaming site*, ZDNet (2016), Available at: http://zd.net/2byBRLV (reporting "[t]he data also includes an estimated 3.3 million unique site and forum accounts."). The immediate consumer trust embedded into platforms' brands is worth billions of dollars. *The Economics Of Trust*, Forbes (2010), Available at: http://bit.ly/2wJr76Y (writing "[t]he reason why the U.S. is richer than Somalia is mostly not because of culture. The great thing about formal systems, when well designed, is that they make a little bit of public spirit, altruism or professionalism go a long way," says Paul Seabright, an economics professor at the University of Toulouse."). Platforms' trusted brands allow developers to clear the critical hurdle of achieving trust from consumer adoption.

4. Platforms strengthen intellectual property protections for app developers

In the age of retail software distribution, companies struggled to secure and protect their intellectual property from theft and copyright abuse. Platforms not only

provide an important framework for app companies to engage with consumers, but they also assist in preventing infringement of app companies' intellectual property. For example, Petitioner's platform provides a content dispute mechanism that allows app companies to submit a claim to connect with entities that have allegedly violated their intellectual property. Apple Inc., *iTunes App Store Content Dispute*, Available at: http://apple.co/2xrvK9c. While maintaining a database of all the apps it hosts, the platform provides a mechanism that reduces the hurdles companies must go through to tackle copyright infringement. *E.g.*, Dan Russell-Pinson, *OMG! Someone Copied My App. What Do I Do Now?*, ACT | The App Association (August 30, 2017) Available at: http://bit.ly/2wKvm23.

Without the dispute resolution mechanisms of platforms, app companies are often left with an untenable alternative: copyright infringement litigation in federal court. Federal litigation poses an oppressive burden on app developers, particularly small businesses with limited resources. Within these cases, the rightful owners of the copyright may be faced with several thousand dollars per month in legal fees, the expense of new license compliance, and months or years diverted from company matters, not to mention the cost if the litigation is unsuccessful. Kelly Johnson Swan, *United States: The True Cost of Defending Against Copyright Infringement Litigation*, Scott & Scott LLP (August 19, 2015) Available at: http://bit.ly/2xsdOvf. Platforms provide a vital, cost-effective avenue for app developers and copyright holders to dispute and address intellectual property theft and infringement.

B. By Ignoring the Roles of Market Participants in the App Economy, the Ninth Circuit's Functional Approach of the Direct Sellers Rule Implicitly Categorizes Petitioner as a Reseller of all Apps it Hosts on its Platform

The Ninth Circuit's decision at issue before this Court radically expanded the eligible parties that may seek antitrust class action relief against digital commerce companies that utilize the agency sales approach by baselessly disregarding the fact that Petitioner possesses no property right in an app developer's product. Under Section 4 of the Clayton Act, "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue...and shall recover threefold the damages by him sustained." 15 U.S.C. § 15(a). By virtue of the clause "any person," courts may apply the statute broadly. However, *Illinois Brick Co. v. Illinois* limited that definition by only permitting courts to grant antitrust standing under Rule 12(b)(6) if the plaintiff is the direct purchaser of the company that overcharged as opposed to "others in the chain of manufacture or distribution." 431 U.S. 720, 729 (1977).

In *Illinois Brick*, the State of Illinois sued a concrete block manufacturer, Illinois Brick, for allegedly fixing prices of concrete blocks. The manufacturer had sold the blocks to masonry contractors who used the blocks to build structures. Those contractors then subcontracted other companies to build those structures to later sell to the State of Illinois. The State then sued Illinois Brick for passing on its unlawful overcharge at both stages of the distribution chain; thus, driving up the State's

cost downstream when buying the structures from the contractors. In this case, this Court rejected the State's argument because, if it were to accept such an analysis, then it would make it almost impossible for a court to discern where the harm—in this case, an overcharged concrete block—actually occurred. Additionally, the policy behind this ruling was that holding indirect purchasers liable for passed-on overcharges would clog up the court system and lead to costly litigation haling in upstream and downstream actors unjustifiably. Milton Handler, *Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term—1977*, 77 Colum. L. Rev. 979 (1977) (writing "the courts have no escape from drawing lines to exclude those damage claims which escalate defendants' liability beyond all reasonable bounds, produce an overkill, compel the courts to engage in speculation in computing damages, and *clog the dockets with countless litigations*. Besides supporting a limited standing doctrine, these same policy considerations also undergird the Court's decisions in *Brunswick* and *Illinois Brick Co v. Illinois*. [emphasis added]"). Therefore, courts hold that direct-purchaser litigants are only allowed to bring an antitrust suit, meaning purchasers cannot sue entities from which they did not directly buy. *Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199 (1990).

The essential question before the Ninth Circuit was whether the Respondent, when buying apps, was directly purchasing the app from the developer or the Petitioner. Petitioner argued that it does not sell apps but rather sells "software distribution services" to developers and, therefore, could not be both a distributor of apps and its purchaser. The Ninth Circuit dubiously dismissed this

claim by relying solely on the fact that app developers do not have a store of their own to sell their product. Put another way, according to the Ninth Circuit, app developers could only go through Petitioner if they wanted to sell their apps on the App Store. The court reasoned that because Petitioner presented the final price and consumers could only purchase the app through the App Store, Petitioner was the direct seller. Therefore, the Ninth Circuit's logic was that consumers are actually buying Apple's iPhone apps as opposed to buying from a third-party app developer because consumers could only buy from Petitioner's App Store when buying apps on an iPhone; therefore, according to the Ninth Circuit, Respondent can sue Petitioner under antitrust theory.

The Ninth Circuit's interpretation of consumers as direct buyers from the Petitioner in essence categorizes platform companies as mere resellers of apps; thus, unjustifiably providing the Petitioner and other platform companies with ownership rights in developers' apps to satisfy its conclusion. Under that interpretation, it would logically follow that the app developer would not be entitled to any profit from the consumer when purchased through Petitioner's platform because Petitioner would have owned the app at the time the consumer purchased it off of the App Store. This is factually inconsistent with the way in which the app developer and the Petitioner interact. In reality, within the developer-platform relationship, the Petitioner is only entitled to the agreed upon percentage of the app developers' app fee. Aside from this fee, the Petitioner has no ownership rights to the app. In addition, platform owners permit app developers to provide their apps on platforms not owned by the Petitioner, unencumbered by the Petitioner. All creative rights solely belong to the app

developer and are uninhibited by the Petitioner. Moreover, when a consumer agrees to "terms of service" for each app he or she purchases, the app's developer maintains sole responsibility for any breach of those terms. App developers are also solely responsible for any disruption in their service because of a lack of integrity in their code, and the onus rests on them to fix it. Thus, Petitioner is not a reseller of apps because it is not the owner of any third-party apps it hosts on its App Store.

Thus, the Ninth Circuit conflates two distinct properties to fit its narrative, which confuses the distinction of the entity from which the consumer purchased the app. *Illinois Brick* specifically sought to prevent this type of conflation by focusing on direct purchasers. However, the Ninth Circuit's "functional" test completely sidesteps *Illinois Brick*'s critical analysis, forcing this Court to determine whether, in the face of business and contract realities that say otherwise, our members are making apps for Apple or are independent innovators that are creating apps for their customers: the consumers. As we demonstrate above, it is unequivocally the latter.

II. The Ninth Circuit Misapplies *Illinois Brick*, and Would Allow Consumers to Interject into the Platform and App Developer Business Relationship

At the heart of the indirect-purchaser doctrine, the Court expressed concern of indirect purchasers taking issue with upstream negotiations and providing them the ability to object to the negotiated price from upstream agreements to which they were not a party. *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968) (involving a shoe manufacturer alleging antitrust harm

against the company *directly* selling it a machine that, in part, makes its product and that its "practice of refusing to sell machines was an instrument of the monopolization.") (emphasis added). Key to analyzing this doctrine is to examine where the direct contractual relationship exists, put another way: who is selling to whom. *See id.* This means that, for purposes of antitrust standing, people or entities can only sue those companies that have direct control over the product and its pricing.

The District Court in this case, which the Ninth Circuit later overturned, accurately held that the *Illinois Brick* decision requires a careful evaluation of whether a plaintiff is claiming a harm based on direct interactions or pass-through damages. *In re Apple iPhone Antitrust Litig.*, No. 11-CV-06714-YGR, 2013 WL 6253147 (N.D. Cal. Dec. 2, 2013), rev'd and remanded sub nom. *In re Apple iPhone Antitrust Litig.*, 846 F.3d 313 (9th Cir. 2017). We agree with the District Court's view that, simply, the court must evaluate who sets the price. The App Association also agrees with the District Court's determination that "any injury to Plaintiffs is an indirect effect resulting from the [influence of Petitioner's commission on] software developers' own costs," which could not be litigated without "speculat[ing] into developers' pricing structure, their costs, ability to find a distribution chain, and/or desired profits or rates of return." *See id.* at p. 6. The Ninth Circuit's assertion, reached through its self-created "functional" test, ignores these considerations that are integral for a court to determine who is the direct purchaser of whom for purposes of antitrust standing. *See id.*

Unfortunately, the Ninth Circuit's analysis misapplies *Illinois Brick* because it assigns to Petitioner the role of "distributor" without regard to whether Petitioner passed along the alleged overcharge and ran afoul to its precedent. In fact, *Delaware Valley Surgical Supply, Inc. v. Johnson & Johnson*—which the Ninth Circuit relies on heavily—demonstrates this point. In *Delaware Valley*, the distributor, Owens & Minor (O&M), negotiated the price paid to the producer. 523 F.3d 1116, 1122-23 (9th Cir. 2008). The Ninth Circuit in that case held that Bamberg Memorial Hospital (Bamberg) was *not* a direct purchaser of products from Johnson & Johnson because Bamberg paid O&M—a medical device distributor—directly and was, thus, its customer for purposes of antitrust standing. *See id.* at 1122. The Ninth Circuit went on to say that O&M was Johnson & Johnson's customer, because O&M purchased the products from it directly. Therefore, Bamberg could not sue Johnson & Johnson under section 4 of the Clayton Act because it had no contractual relationship with Johnson & Johnson in the context of the medical devices O&M sold to it. The key factor in this case was with which entity did the buyer contract.

The Ninth Circuit in this case explicitly ignores any distinction between the facts in *Delaware Valley* and the case at bar. In fact, the panel goes out of its way to acknowledge that app developers set their price, but then proceeds to say that it is irrelevant to its direct-purchaser analysis without elaborating as to why it is irrelevant or how *Delaware Valley* makes it irrelevant. *See In re Apple iPhone Antitrust Litig.*, 846 F.3d 313, 329 (9th Cir. 2017). Confusingly, it states later that, "[The panel] do[es] not address the question whether Apple sells distribution services to app developers within the meaning of *Illinois*

Brick." *See id. at* 330. This is absolutely baffling because these two factors are precisely what distinguishes the facts of this case from that of *Delaware Valley*. Mostly because these two factors place the consumer as the app developer's direct customer not Petitioner's as we explain below.

In this case, app developers, like our members, set the price of their apps and pass through the cost of the Petitioner's distribution service to their consumers. In *Delaware Valley*, O&M's role as a price negotiator is key to the analysis because the only reason for such a Clayton Act complaint in the first place is the price itself. In the instant case, Petitioner passes on the cost of the app. The factors at play leading to the decision to set an app's price—for example, labor, intellectual property, Petitioner's commission, and demand—are outside Petitioner's scope and entirely subject to the app developer's judgment. It is clear from their initial complaints at the District Court level that the parties at bar take issue with our members' pricing of their products and terms within their almost ten-year negotiation with Petitioner (i.e., Petitioner's 30 percent charge). *In re Apple iPhone Antitrust Litig.*, No. 11-CV-06714-YGR, 2013 WL 6253147, at 1-2 (N.D. Cal. Dec. 2, 2013), rev'd and remanded sub nom. *In re Apple iPhone Antitrust Litig.*, 846 F.3d 313 (9th Cir. 2017); *see also*, ACT | The App Association, *The Symbiotic Relationship Between App Developers and Platforms: A Ten-Year Retrospect*, Website (last checked, August 7, 2018). Available at: http://actonline.org/wp-content/uploads/2018_ACT-App-Store-Ten-Year-Retro-Doc.pdf.

To offset the costs of running its App Store, the Petitioner issues a 30 percent fee on apps that have an

upfront subscription or in-app purchases. For each year thereafter, the Petitioner lowers its fee to 15 percent, yielding an 85 percent profit for the app developer. *See* App Store Guidelines. Outside of the App Store, however, app developers can collect 100 percent of their profits from sales or subscriptions, *See id.*; but their sales are often lower because it is difficult to reach the same volume of consumers outside of a large, centralized app platform. Hugo Delgado, ***The App Economy Forecast: A $6 Trillion Market in the Making***, App Annie (2017) Available at: http://bit.ly/2xfDqtB (reporting that global mobile commerce is outpacing other forms of monetization and growing at a 38% compound annual growth rate). App developers can also offer their products free of charge if they so choose. *See* App Store Guidelines. In fact, roughly 90 percent of apps made available on the App Store platform are free. ***See Distribution of Free and Paid Apps in the Apple App Store and Google Play as of 1st Quarter*** 2018, Statista (last checked Jul. 11, 2018) available at: https://www.statista.com/statistics/263797/number-of-applications-for-mobile-phones/; ***see also***, Sarah Perez, ***Paid Apps on the Decline: 90% of iOS Apps Are Free, Up From 80-84% During 2010-2012, Says Flurry***, TechCrunch (Jul. 18, 2013), https://techcrunch.com/2013/07/18/paid-apps-on-the-decline-90-of-ios-apps-are-free-up-from-80-84-during-2010-2012-says-flurry/. In this case, the Respondent seeks to object to terms our members have with Petitioner and refuse to acknowledge that the various pricing structures our members offer on Petitioner's platform.

If the Court accepts the Ninth Circuit's interpretation, then it is endorsing the idea that consumers can object to terms from upstream negotiations, having one of two

effects for our member companies: (1) to mitigate the threat of consumers suing platform companies for prices of apps, platform companies will engage in setting the price for our member companies' products or at least want more control over that aspect of their business models; or (2) platforms will not impose their nominal fees and, by extension, the services that come with it. *See Supra* I.A.1-4. The former situation would force app developers to release control over how they price their products. However, the latter produces losers at each stage because app developers would then have to absorb the exorbitant overhead costs they experienced before the advent of mobile platforms. *See id.* In either scenario, these results could yield fewer choices and higher prices for the consumers buying apps on mobile platforms, Petitioner's included.

As stated before, the court in *Delaware Valley* did not make this mistake and neither should this Court in the instant case. If *Illinois Brick* has any meaning, courts must avoid blindly categorizing an entity as a "distributor" that antitrust plaintiffs can sue without more deeply considering the distributor's role. Thus, the Court should overturn the Ninth Circuit's mistake here.

CONCLUSION

For the aforementioned reasons, we respectfully ask the Court to overturn the Ninth Circuit's decision in this case.

Respectfully submitted,

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No. 17-204

IN THE

Supreme Court of the United States

APPLE INC.,

Petitioner,

v.

ROBERT PEPPER, ET AL.,

Respondents.

On a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR THE AMERICAN ANTITRUST INSTITUTE AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

The American Antitrust Institute ("AAI") is an independent, nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. It serves the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. AAI enjoys the input of an Advisory Board that consists of over 130 prominent antitrust lawyers, law professors, economists, and business leaders. *See* http://www.antitrustinstitute.org.[1] AAI has a strong interest in ensuring effective public and private enforcement of the antitrust laws. The issue in this case—whether consumers who purchase directly from Apple, an alleged monopolist, may sue Apple for damages—implicates a core feature of this nation's antitrust regime.

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[1] The written consents of all parties to the filing of this brief have been lodged with the Clerk. Individual views of members of AAI's Board of Directors or Advisory Board may differ from AAI's positions. No counsel for a party has authored this brief in whole or in part, and no person other than amicus curiae has made a monetary contribution to fund its preparation or submission.

INTRODUCTION AND BACKGROUND

This case raises the question of whether a retailer that unlawfully monopolizes the distribution and sale of a popular product and thereby raises retail prices can avoid liability to its customers under the "indirect purchaser" rule of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), because it permits suppliers to price its product within limits dictated by the retailer. AAI takes no position on the merits of respondents' monopolization claims, and the merits should be irrelevant to the *Illinois Brick* question.[2]

A ruling in favor of petitioner would have far-reaching adverse consequences because, without consumer standing in cases like this, monopolistic conduct may be immunized from damages claims. It is unlikely that suppliers would challenge a distribution monopoly. They are, by definition, beholden to the monopolist to distribute their product, and some of them may benefit from the monopoly. Moreover, as here, no excluded rival may exist to challenge the monopolistic conduct.

Accordingly, a ruling in favor of petitioner would harm consumers not merely by denying them compensation for injuries inflicted by unlawful monopolization in cases like this, but also by substantially reducing deterrence of antitrust violations by dominant retail firms operating under an "agency model." Consumers would also be harmed insofar as they would be denied a market-based determination of

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[2] Since the case arises on a motion to dismiss, the well-pleaded allegations in the complaint must be accepted as true. It is worth noting that because *Illinois Brick* does not bar claims for equitable relief, a ruling in petitioner's favor would not terminate the case.

appropriate distribution models. If retailers using the agency model, rather than the traditional "wholesale model," receive more favorable antitrust treatment, firms will be induced to adopt the agency model, regardless of whether it would otherwise be more or less efficient to do so. And firms using a wholesale model would be unfairly disadvantaged.

***

Respondents allege that they "purchased software applications or licenses for software applications" from Apple's App Store for use on iPhones. Pet. App. 40a (¶1). They contend that "Apple violated Section 2 of the Sherman Act by monopolizing or attempting to monopolize the software applications aftermarket for iPhones." Pet. App. 45a (¶15). Apple's anticompetitive conduct is directed at both app developers and consumers, and includes: "(a) designing the iPhone iOS as a closed system and installing security measures and program locks for the specific purpose of preventing Third Party App downloads; (b) establishing the App Store as the exclusive worldwide distributor of iPhone apps; and (c) enforcing the App Store's monopoly status by terminating or threatening to terminate apps developers who sell apps in competition with Apple and by voiding the warranties of iPhone consumers who buy competing apps." Pet. App. 60a (¶71), 61a-62a (¶76).

As a result of Apple's monopoly, app developers have no choice but to sell their apps through the App Store. And consumers have no choice but to buy iPhone apps from the App Store. Respondents allege that they "have been injured by Apple's anticompetitive conduct because they paid more for their iPhone apps than they would have paid in a competitive market." Pet. App. 53a (¶45).

Apple concedes that respondents buy apps directly from it. It explains that "[i]n electronic marketplaces such as Apple's App Store at issue in this case, the marketplace sponsor interacts with and delivers goods 'directly' to consumers." Pet. Br. i. And it accepts respondents' characterization that "'Apple places the developers' apps on the virtual shelves of its App Store, sells them *directly* to iPhone customers, charges and collects the full price (including its own 30% fee) from customers, keeps its 30% fee from every sale or license, and then remits the balance of the purchase price to the developer.'" *Id.* at 8 n.2 (emphasis added) (quoting respondents' brief in the Ninth Circuit).[3]

All app developers must accept Apple's non-negotiable license, under which Apple, among other things: (1) approves, in its sole discretion, all apps before offering them for sale in the App Store; (2) hosts all apps on its own servers; and (3) reserves the right to terminate developers with or without cause. *See* Apple License §§ 1, 6 & Sch. 2, §§1.2(b), 2, 3.1, and 7.3.

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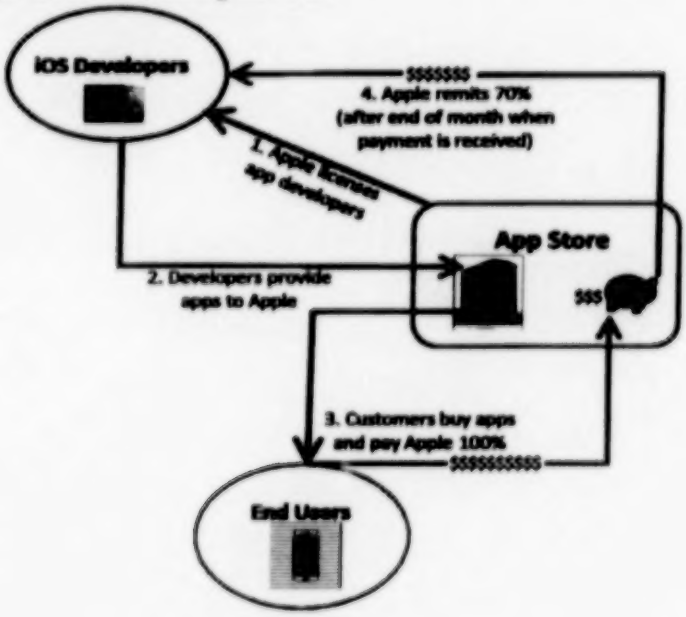
[3] Apple remits the 70% payment to developers following the close of the month in which it receives the end-user's payment. Apple, Developer Program License Agreement, Sch. 2, §§ 3.4, 3.5 (June 4, 2018) ("Apple License"), https://download.developer.apple.com/Documentation/License_Agreements__Apple_Developer_Program/Apple_Developer_Program_License_Agreement_20180604.pdf. This URL link includes in its file identification the date June 4, 2018 ("20180604"), which is "[t]he latest [Apple Developer Program License] agreement." Apple Review, Guidelines, https://developer.apple.com/app-store/review/ (last visited Oct. 1, 2018). Apple admits that its license is "widely available on the internet." Pet. Br. 36 n.15.

The following diagram illustrates the relationships between the parties:



SUMMARY OF ARGUMENT

This Court should not expand the *Illinois Brick* rule to bar iPhone users who purchase apps directly from Apple from suing Apple for monopolization merely because Apple permits app developers some discretion to price the apps that Apple itself sells to iPhone users.

1. This Court's three decisions involving direct and indirect purchasers—*Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), and *Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199 (1990)—do not support treating the respondents here as indirect purchasers. *Hanover Shoe* refused to allow

the monopolist to escape overcharges that its own customer paid by arguing that the overcharges moved down the distribution chain to others. *Illinois Brick* and *UtiliCorp* similarly refused to permit persons down the distribution chain, who did not purchase from the antitrust violator, to claim damages from the violation. By contrast, respondents are the "immediate buyers from the alleged antitrust violator[]"—Apple. *UtiliCorp*, 497 U.S. at 207. A straightforward reading of the cases establishes that respondents are direct purchasers.

Respondents' damage theory will involve comparing the price that Apple would have charged consumers in a competitive market compared to the allegedly inflated price that they in fact paid Apple. Contrary to Apple's contention, it is not dispositive that respondents' theory may require them to prove how app developers' pricing would change if Apple reduced its commission. Antitrust cases commonly require a plaintiff to show how cost changes, both up and down, affect market prices, and the proof here is less complicated than Apple maintains.

Illinois Brick's concern about the difficulty of proving "pass on" arose where the alleged victim was disconnected from the antitrust violator by one or more levels in the distribution chain. There is no such disconnect here. To the contrary, Apple and respondents deal directly. Moreover, difficulty of proof was only one of the policy considerations, which, on the whole, militate in support of standing here, as discussed below.

2. While Apple contends that the Ninth Circuit elevated form over substance by focusing on the distribution function that Apple serves, rather than how

it prices its product, Apple is the one seeking to elevate form over substance. The substance of the matter is that monopolization in the middle of a distribution chain has both upstream and downstream effects, regardless of whether sales to consumers are made using a traditional "wholesale" pricing model or an "agency" pricing model like Apple's.

Under a wholesale model, consumers would have standing to recover from Apple the overcharge paid for apps, and developers would have standing to recover lost profits resulting from artificially depressed wholesale prices or reduced sales. Nothing in economics or antitrust law suggests that a different *Illinois Brick* rule should apply to the "agency" pricing model. If a more favorable rule for retailers that follow such a model were adopted, firms would have incentives to use it to evade antitrust scrutiny—a result that would harm consumers, distort business decisionmaking, and unfairly disadvantage businesses using a traditional wholesale model not similarly amenable to such evasion.

Apple's argument that respondents are really challenging "distribution services" that Apple sells to app developers, as to which consumers are merely indirect purchasers, is a makeweight. This argument distorts the complaint, ignores that Apple provides the same services without charge to developers who provide "free" apps as it does to developers who provide apps with a price tag, and is inconsistent with how Apple transacts with app developers (by paying *them*). In any event, the argument is irrelevant. Every buyer in a distribution chain, even a traditional retailer like Best Buy, provides "distribution services" to its suppliers the cost of which can be measured by

the difference between the wholesale price it pays suppliers and the price at which it resells. What counts is not how the relationship between suppliers and distributors is characterized, but that Apple's monopolization of the retail distribution level has adverse effects on its suppliers and consumers, and each should be able to recover, based on non-duplicative claims. There is no antitrust rule or principle that restricts standing to only one group harmed by anticompetitive conduct.

Apple's assertion that it is merely the "agent" of app developers is similarly a fiction. Apple controls the terms on which developers are permitted to have Apple sell their apps in the App Store. Apple cannot use its non-negotiable license, required of all app developers, to appoint itself an "agent," and then use its self-appointment to dissociate itself from overcharges that Apple extracts from its own customers.

3. *Hanover Shoe* and *Illinois Brick* are premised on "the longstanding policy of encouraging vigorous private enforcement of the antitrust laws." *Illinois Brick*, 431 U.S. at 745. Preventing consumers from suing a distribution monopolist that follows an agency pricing model seriously undermines deterrence. Suppliers who, by definition, depend on the monopolist to distribute their product, are unlikely to sue. Here, app developers cannot risk being excluded from the App Store for suing Apple because there is no other way to offer iOS apps to iPhone users. A recent example involving a popular app, discussed *infra*, supports the point. Moreover, some app developers may benefit from Apple's monopoly.

There is no risk of duplicative damages in this case because, if app developers did sue, they would

seek recovery of their lost profits, just as a supplier to a retailer following a wholesale model ordinarily would. And consumers would recover for their overcharges measured by the increase in app prices they paid to Apple.

Proving the price of apps that consumers would have paid in a competitive market is no more complicated than in other monopoly or price fixing cases. Indeed, in the "eBooks" litigation against Apple and several publishers, expert econometric analysis—similarly available here—considered over 149 million sales of 1.3 million book titles, sold at different price levels by various eBook vendors. The court certified a class of eBook purchasers, and the litigation eventually settled for more than $560 million.

4. Finally, as the United States points out, there is no basis for the Court to revisit *Illinois Brick* and *Hanover Shoe* here. To the extent there are problems with the current private enforcement regime, they tend to be exaggerated and are better addressed by Congress.

ARGUMENT

I. *ILLINOIS BRICK*'S PROHIBITION OF INDIRECT-PURCHASER DAMAGE ACTIONS DOES NOT EXTEND TO RESPONDENTS' PURCHASES FROM APPLE

"Because protecting consumers from monopoly prices is the central concern of antitrust, buyers have usually been preferred plaintiffs in private antitrust litigation. As a result, consumer standing to recover for an overcharge paid directly to an illegal cartel or monopoly is seldom doubted." IIA Phillip E. Areeda & Herbert Hovenkamp, et al., *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, ¶ 345, at 179 (4th ed. 2014); *see Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) ("Congress designed the Sherman Act as a 'consumer welfare prescription.'") (quoting Robert Bork, *The Antitrust Paradox* 66 (1978)).

To be sure, in *Illinois Brick*, 431 U.S. 720, this Court limited consumer standing when consumers are indirect purchasers in a chain of distribution, but the circumstances here are quite unlike those that prompted the *Illinois Brick* rule and that are reflected in the Court's other cases involving direct and indirect purchasers, *Hanover Shoe*, 392 U.S. 481, and *UtiliCorp.*, 497 U.S. 199. *Hanover Shoe* refused to allow the monopolist to escape overcharges that its own customer paid by arguing that the overcharges moved down the distribution chain to others. *Illinois Brick* and *UtiliCorp* similarly refused to permit persons down the distribution chain, who did not purchase from the antitrust violator, to claim damages from the violation. The Court was concerned about the "'massive evidence and complicated theories'" in-

volved in "trac[ing] the effect of the overcharge *through each step in the distribution chain* from the direct purchaser to the ultimate consumer." *Illinois Brick*, 431 U.S. 741 (quoting *Hanover Shoe*, 392 U.S. at 493) (emphasis added).

Here, the alleged antitrust violator is not an upstream firm in a chain of distribution. Rather, Apple admittedly sells apps *directly* to iPhone owners through the App Store, and owners pay Apple *directly* before app developers receive any compensation, *i.e.*, iPhone owners are the "immediate buyers from the alleged antitrust violator[]." *UtiliCorp*, 497 U.S. 207.

Nevertheless, Apple argues that iPhone owners are not "direct purchasers," primarily because Apple partially outsources the pricing of apps to app developers. *See* Pet. Br. 37 (what counts is "who is setting the price, and what does that mean for the plaintiffs' damages theory").[4] According to Apple, figuring out the prices that app developers would set in a competitive market with reduced commissions would be incredibly complex. *See* Pet. Br. 27. But as discussed *infra*, Apple overstates the difficulty of proof. Moreover, while difficulties of proof were certainly one rationale for *Illinois Brick*, on the whole, the rationales support standing here. *See infra* at pp. 21-28.

In any event, *Illinois Brick* and *UtiliCorp* do not hold that any time a plaintiff's damages theory depends on proof of how market prices are affected by a cost increase, the plaintiff is an "indirect purchaser." If that were the case, then a consumer would not

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[4] The outsourcing is partial because Apple *restricts* developer pricing discretion by dictating that (1) the lowest price tier for an app is 99 cents, and (2) all higher tiers must be set in $1 increments, ending in 99 cents. Pet. Br. 9; Res. Br. 7.

have standing to recover against a monopolist that raises its rivals' costs if the increase in market prices depends on showing how much of those costs are "passed on" by the rival. And consumers from a cartel would have no standing if their damages theory depended on showing how some exogenous cost increase affected the cartel's prices. Antitrust cases commonly require a plaintiff to show how cost changes, both up and down, affect market prices.

Illinois Brick's concern about the difficulties of proof of "pass on" was limited to the context of deciding which entity in a linear chain of distribution, from antitrust violator to end consumer, should have standing. Accordingly, it held simply that, as between the direct and indirect purchasers in such a chain of distribution, the antitrust claim belongs to the former. In the arrangement among app developers, Apple, and consumers, the "immediate buyers" from Apple, the alleged antitrust violator, are consumers. That is sufficient under *Illinois Brick*.

II. APPLE'S USE OF AN "AGENCY MODEL" SHOULD NOT INSULATE IT FROM MONOPOLIZATION CLAIMS BY ITS CUSTOMERS

A. Monopolization of Distribution Has the Same Economic Effect Regardless of Whether the Monopolist Uses an Agency or Wholesale Model

Apple operates the App Store under an "agency model" whereby Apple has enlisted developers to set the retail price of the apps that it sells—subject, of course, to Apple's pricing rules. If Apple operated the App Store, instead, under a "wholesale model"—as it does for example with iTunes—it would pay a whole-

sale price for apps to developers and set the retail price of apps to consumers. *See generally* Richard J. Gilbert, *E-books: A Tale of Digital Disruption*, 29 J. Econ. Persp. 165 (Summer 2015) (describing difference between wholesale and agency pricing models). Under either model, the effect of its monopolization of app sales is comparable: injured consumers pay higher prices and injured app developers lose profits.[5] If Apple employed a wholesale model, consumers clearly would have standing to recover from Apple the overcharge paid for apps, and developers would have standing to recover their lost profits resulting from lower wholesale prices or reduced sales.[6]

Nothing in economics or antitrust law suggests that a different *Illinois Brick* rule should apply to the use of an agency pricing model. On the contrary, this Court has repeatedly emphasized that antitrust treatment should not turn on formalist distinctions, as Apple itself recognizes. Pet. Br. 17, 34; *see Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 762, 772-73 (1984) (rejecting "intra-enterprise conspiracy" doctrine because it "looks to the form of an enterprise's structure and ignores the reality" and "[i]f antitrust liability turned on the garb in which a corporate subunit was clothed, parent corporations would be encouraged to convert subsidiaries into unincorporated divisions").

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[5] Apple's 30% commission is analogous to a tax on apps, the incidence of which will be the same whether imposed on developers or consumers. *See* Kyle D. Logue & Joel Slemrod, *Of Coase, Calabresi, and Optimal Tax Liability*, 63 Tax L. Rev. 797, 799 (2010) (discussing the "theorem of the invariance of tax incidence") (citation and internal quotations omitted).

[6] Some suppliers could also benefit from the retail monopoly under either model.

The costs to take a product from its producer to the end-user are economic facts that do not depend on whether parties in the distribution chain adopt an agency pricing model or a wholesale model: "a distribution system that relies on brokerage is *economically indistinguishable* from one that relies on purchaser-resellers." IIA Areeda & Hovenkamp, *supra*, ¶ 345, at 183 (emphasis added); *see also id.* ¶ 346, at 211-12. The Court of Appeals grasped this point well: "[T]he distinction between a markup and a commission is immaterial. The key to the analysis is the function Apple serves rather than the manner in which it receives compensation for performing that function." Pet. App. 20a-21a.

This Court should decline Apple's invitation to expand the *Illinois Brick* rule so as to encourage businesses to adopt a business model by which dominant companies could immunize themselves against antitrust scrutiny for sales to their own direct customers. A firm's choice among business models should be determined by the free market, not by distorting antitrust rules. *See* Gilbert, *supra*, at 177 (outlining relevant factors). Apple points to the proliferation of online platforms that use an agency pricing model and suggests that this is a reason to preclude consumer suits. Pet. Br. 45. But this shows only the importance of *not* granting more favorable antitrust treatment to firms using the agency model than to those using a traditional wholesale model.

B. Apple's Distribution Services Argument Lacks Merit

Apple seeks to characterize respondents' claim as one challenging Apple's monopolization of "distribution services" purchased directly by app developers,

thereby making respondents only indirect purchasers from Apple and presumably direct purchasers from app developers.[7] Of course, the complaint itself challenges Apple's monopolization of app sales to consumers, not the monopolization of distribution services. Moreover, the characterization of app developers as purchasers of distribution services is inapt on its face because the 30% commission, which supposedly represents the charge for these services, is levied only upon developers who sell paid apps, not developers offering free apps. Nor do app developers purchase these services directly, since they "pay" Apple only after Apple itself is paid in the first instance by the customer.[8] And in any lawsuit against them (in this case or otherwise), app developers would surely claim that consumers are merely indirect purchasers of apps from them.

It is, therefore, more apt to characterize app developers as *sellers* or licensors of apps to Apple for which they are paid 70% of the purchase price that

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[7] Apple characterizes the distribution relationship as: Apple (services) ▸ app developers (apps) ▸ consumers.

[8] Even assuming, *arguendo*, that app developers could be characterized as purchasers of distribution services, that the overcharge sought by respondents is Apple's supra-competitive commission (which it is not; *see infra* at p. 25), and that there can be only one direct purchaser under *Illinois Brick*, the role of direct purchaser would still be assigned to "[t]he first party that directly pays an alleged overcharge." Pet. Br. 17. And that party is the consumer. App developers would make no "purchase" of distribution services until *after* a consumer pays for the app and Apple deducts the commission from the consumer's payment. Moreover, app developers would not be injured until *after* they received less revenue from Apple as a result of some combination of a higher commission and a price point that does not fully offset the higher commission.

Apple receives from customers. In any event, antitrust treatment should not turn on the characterization of app developers as buyers or sellers, since the effect of Apple's monopolization on consumers is the same regardless of how the developers are labeled.

Indeed, Apple's distribution services argument proves too much. Whenever a product moves through marketing levels, the higher-level participant may be said to purchase "distribution services" from the next lower level participant, even if the retailer operates under a traditional wholesale model. *See, e.g., Cont'l TV, Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 56 n.24 (1977) ("the difference between the price at which [a manufacturer] sells to its retailers and their price to the consumer [is] his 'cost of distribution'") (quoting Richard A. Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 Colum. L. Rev. 282, 283 (1975)); *see also Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 896 (2007). Thus, every case involving monopolization in the middle of the distribution chain could be said to be about "distribution services" as to which the effect on consumers is merely "indirect" and therefore not redressable by them. Antitrust law, however, does not recognize any such limitation on standing to sue.[9]

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[9] This case is unlike *Campos v. Ticketmaster Corp.*, 140 F.3d 1166, 1171 (8th Cir. 1998). There, the plaintiffs, concert ticket buyers, explicitly alleged that they purchased "ticket distribution services"—services for which concert venues had to first engage Ticketmaster. *Id.* Here, on the other hand, respondents allege that they purchased apps as end users—not services that Apple provided to developers. *See also* Resp. Br. 35-37 (distinguishing *Campos*). And in all events, for the reasons set forth

C. Apple's Single-Plaintiff Argument Lacks Merit

As Areeda & Hovenkamp explain, "The mere fact that an antitrust violation produces two different classes of victims hardly entails that their injuries are duplicative of one another. For example, successful predatory pricing, exclusive dealing or similar exclusionary practices injure rivals by destroying their profits or their businesses; it ultimately injures consumers as well through higher product prices." IIA Areeda & Hovenkamp, *supra*, ¶ 339d, at 136. Thus, Apple is surely incorrect when it states (Pet. Br. 32), "Determining the 'direct purchaser' is . . . necessarily an endeavor to find *one* appropriate plaintiff group among the categories of possible plaintiffs, thus *eliminating* any potential risk of duplicative recoveries." *See, e.g., Blue Shield of Va. v. McCready*, 457 U.S. 465 (1982) (patient treated by a psychologist and psychologists themselves had standing to sue Blue Shield for conspiring to limit insurance benefits to treatment by psychiatrists).

Consumers commonly have standing in monopolization cases to challenge anticompetitive restraints affecting rivals or suppliers, which result in higher market prices. *See, e.g., In re DDAVP Direct Purchaser Antitrust Litig.*, 585 F.3d 677, 688 (2d Cir. 2009) (monopolist's customers stated a claim based on the defendant's *"Walker Process"* fraud in procuring a patent by which competitors could be excluded); *In re Lorazepam & Clorazepate Antitrust Litig.*, 202 F.R.D. 12, 21 (D.D.C. 2001) (where a drug manufacturer's exclusive dealing contracts with its input suppliers

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here and in respondents' brief, the majority analysis in *Campos* is unsound.

enabled the manufacturer to increase its drug prices to customers, those direct-purchaser customers stated a Section 2 claim).[10] The fact that excluded firms may be more directly affected than consumers is of no moment.

D. Apple's Agency Argument Lacks Merit

Apple's suggestion that it merely acts as an agent of the developers does not change the *Illinois Brick* analysis.[11] First, whatever Apple may call itself in its developer license agreements, its relationship with respondents does not turn on the law of agency. In *Simpson v. Union Oil Co. of Cal.*, 377 U.S. 13, 24 (1964), a gasoline supplier entered into a "consign-

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[10] Consider a distribution monopolist that forces suppliers not to deal with rival distributors that have lower margins and lower retail prices. *Cf. Toys "R" Us v. FTC*, 221 F.3d 928 (7th Cir. 2000) (involving dominant retailer's exclusionary agreements with manufacturers). Potential plaintiffs with standing and distinct injuries would include: (a) excluded rivals that lose profits, (b) consumers that pay higher retail prices, and (c) suppliers that lose profits because of lower sales volume or artificially reduced wholesale prices.

[11] The agency argument is peculiar because if Apple really were the developers' agent, then the *Illinois Brick* rule would not apply. *See Illinois Brick*, 431 U.S. at 765 n.16 (control exception); *cf. Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 194 n.5 (2010) (principal and agent may be treated as a single economic unit). Moreover, if a retailer sets its prices at the direction of its supplier, consumers have standing to sue both the "innocent retailer" and the indirect supplier for unlawful resale price maintenance. *See, e.g., Reiter v. Sonotone, Corp.*, 486 F. Supp. 115 (D. Minn. 1980); IIA Areeda & Hovenkamp, *supra*, ¶ 339d, at 136. Yet here, where Apple is the retailer and main alleged antitrust violator, it claims that it may avoid suit by its direct consumers because its price is set by the suppliers. *Cf. In re Elec. Books Antitrust Litig.*, 859 F. Supp. 2d 671 (S.D.N.Y. 2012) (consumer action against publishers and Apple challenging conspiracy to fix retail prices).

ment" agreement with its service stations under which the supplier set the stations' resale prices. This Court disregarded the arrangement for antitrust purposes: "a consignment, no matter how lawful it might be as a matter of private contract law, must give way before the federal antitrust policy." *Id.* at 18. To paraphrase this Court: "To allow [Apple] to achieve [monopolization] in this vast distribution system through this ["agency"] device would be to make legality for antitrust purposes turn on clever draftsmanship." *Id.* at 24. Legalisms aside, consumers understand that they are transacting directly with Apple.

Second, "[a]gency requires more than mere authorization to assert a particular interest. 'An essential element of agency is the principal's right to control the agent's actions.'" *Hollingsworth v. Perry*, 570 U.S. 693, 713 (2013) (quoting Restatement (Third) of Agency § 1.01, cmt. at f (2005)); *see also Edwards v. Freeman*, 34 Cal. 2d 589, 592, 212 P.2d 883, 884 (Cal. 1949) ("In the absence of the essential characteristic of the right of control, there is no true agency . . . . "). Apple cannot credibly contend that it is within the "control" of the developers.

Just the opposite. The complaint alleges that Apple is a distribution monopolist. It dictates the terms of its contracts with app developers accordingly. Apple thus issues a non-negotiable form of license agreement to developers, which details the terms on which Apple will permit their apps to be sold in its App Store. Developers must distribute iOS apps exclusively through Apple, Pet. App. 51a-52a (¶40); Pet. Br. 2, and Apple's devices are, "by design" locked to deny "iPhone customers with a means to download Apps other than from Apple's App Store." JA 70. Ap-

ple's non-negotiable terms further direct that developers pay Apple 30% of the purchase price for each sale by Apple. Pet. Br. 2-3; Apple License, Sch. 2, §3.4. And, in offering its license, Apple dictates its own "appointment" as the developer's "agent" to host, market and deliver apps to end-users. Apple License, Sch. 2, §1.1.

Apple's reliance on *United States v. General Electric Co.*, 272 U.S. 476 (1926), is misplaced. In that case, General Electric, the patent owner and electric lamp manufacturer, was in control of the sales of GE products by its downstream sellers. The facts showed that the sellers were "genuine agents" of General Electric, *id.* at 484, and this Court, therefore, held that General Electric could set the price at which they sold GE lamps. Here, Apple's asserted capacity as "agent" for its developers is illusory; Apple controls the terms on which developers can make apps available for sale by Apple. Equally important, in *Simpson*, this Court emphasized that patent law protections provided "the ratio decidendi of the *General Electric* case. We decline the invitation to extend it." *Simpson*, 377 U.S. at 24 (citation omitted). There are no comparable patent considerations here.

Accordingly, although the App Store operates under an agency pricing model, which gives app developers constrained discretion to price the apps that Apple sells to consumers, Apple is not an agent of the app developers such that respondents should be considered direct purchasers of the app developers rather than of Apple.

III. POLICY CONSIDERATIONS UNDERLYING *HANOVER SHOE* AND *ILLINOIS BRICK* MILITATE IN FAVOR OF RESPONDENTS' STANDING

UtiliCorp holds that the application of the *Illinois Brick* rule does not depend on a case-by-case analysis of whether the policy considerations underlying the rule are applicable. But insofar as there may be disagreement over the appropriate "purchaser" classification, those policy considerations only reinforce treating respondents as direct purchasers. As Areeda & Hovenkamp explain, "one set of purchasers should never be identified as 'indirect' unless those identified as 'direct' (1) actually have the proper incentives to sue and (2) would themselves have a cause of action for overcharge damages rather than damages based on lost profits or some other figure." IIA Areeda & Hovenkamp, *supra*, ¶ 346j, at 214-15. Neither condition is satisfied here. More generally, respondents' standing would further the *Illinois Brick* policies of promoting deterrence and avoiding duplicative recoveries without bogging courts down in unduly complicated matters of proof.

A. Denying Standing to Consumer Victims of Distribution Monopolies Would Undermine Effective Private Enforcement

"Private enforcement of the [Sherman] Act was in no sense an afterthought; it was an integral part of the congressional plan for protecting competition." *Cal. v. Am. Stores Co.*, 495 U.S. 271, 284 (1990); *see also Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 139 (1968) ("[T]he purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone

contemplating business behavior in violation of the antitrust laws."); *Reiter*, 442 U.S. at 344 ("Congress created the treble-damages remedy of § 4 precisely for the purpose of encouraging *private* challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations."); *see also* Hans B. Thorelli, *The Federal Antitrust Policy* 223, 225, 229 (1955) (the Sherman Act's treble-damages provision "buil[t] into the act the feature of self-enforcement that had been typical in cases of restraint of trade at common law . . . Congress put great faith in the act's capacity for self-enforcement taken over from the common law."). Indeed, *Illinois Brick* and *Hanover Shoe* are premised on "the longstanding policy of encouraging vigorous private enforcement of the antitrust laws." *Illinois Brick*, 431 U.S. at 745.

To expand the *Illinois Brick* rule to prevent consumers from challenging a distribution monopoly that follows an agency pricing model would undermine private enforcement because suppliers are unlikely to make such a challenge, particularly when the monopoly is enforced by exclusive dealing agreements to which the suppliers are privy. *See Hanover Shoe*, 392 U.S. at 494 (seeking to avoid result that "those who violate the antitrust laws . . . would retain the fruits of their illegality because no one was available who would bring suit against them").

That suppliers are unlikely to challenge a distribution monopoly is amply demonstrated here. Respondents filed this case in late 2011, and in the nearly-seven years since then, no developer has sued. Pet. App. 3a. While the reason could be, as some of petitioner's amici assert, the lawsuit lacks merit, it is

also clear that app developers have strong incentives not to challenge Apple's monopoly. First, as respondents explain, some app developers may benefit from the monopoly because Apple's exclusivity and pricing provision insulate many developers against competition from other iOS app developers. Resp. Br. 41; *see also* Amicus Br. of ACT | The App Ass'n 4 (supporting petitioner because consumers should not be allowed to "tak[e] issue with upstream negotiations" between app developers and petitioner). Second, and equally important, developers cannot risk the possibility of Apple removing them from the App Store if they bring suit.

App developers that seek to offer apps to iPhone users must do so through the App Store. *See supra* p. 3. The impact of Apple's distribution exclusivity is significant. Recently, Epic—the developer of the popular gaming app, Fortnite (*see* Pet. Br. 27)—decided to bypass Google's Play Store[12] to distribute its game. Epic, however, did not extend its decision to the App Store because "it didn't have a choice. 'If the question is "Would you have done this on iOS if you could have?" the answer would be "Yes,"' the company told CNET." *See* Sean Hollister, *Fortnite Is Putting Users At Risk, To Prove A Point About Google's Android Monopoly*, CNET (Aug. 9, 2018),

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[12] In contrast to Apple, Google does not require exclusivity for developers who write apps for Google's Play Store. *See* Google LLC, Alternative distribution options, Google Play (Apr. 17, 2018), https://developer.android.com/distribute/marketing-tools/alternative-distribution ("As an open platform, Android offers choice. You can distribute your Android apps to users in any way you want, using any distribution approach or combination of approaches that meets your needs.").

https://www.cnet.com/news/fortnite-is-putting-users-at-risk-to-prove-a-point-about-googles-android-monopoly/.

Epic's concern is well-founded. Under its Apple license, "Apple reserves the right to cease marketing, offering, and allowing download" of apps "at any time, with or without cause, by providing notice of termination to You [the developer]." Apple License, Sch. 2, § 7.3. The unwillingness of a highly successful developer like Epic to challenge Apple explains why the many less successful developers will not either, despite reported discontent in the developer community over Apple's 30% charge.[13]

Finally, there are no competitors, *i.e.*, third-party distributors of iOS apps, that might challenge Apple's monopoly precisely because Apple has prevented such competition. Accordingly, if consumers are denied standing here, it is likely that Apple would avoid all damages that its allegedly illegal conduct has caused, and private enforcement against distribution monopolies that use an agency pricing model would be seriously undermined.

B. Apple Is Not Exposed to Duplicative Recoveries

Illinois Brick's concern with duplicative recoveries is not present here. There is no risk of duplicative damages because, if developers were to sue, they would not seek damages on the same overcharge theory available to respondents.

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[13] *See* Mark Bergen & Christopher Palmeri, *Apple and Google Face Growing Revolt Over App Store 'Tax'*, Bloomberg (Aug. 22, 2018), https://www.bloomberg.com/news/articles/2018-08-22/apple-and-google-face-growing-revolt-over-app-store-tax.

Respondents assert that the purchase price they paid to Apple was inflated because, in a competitive market, they could have purchased from other online retailers or directly from app developers at lower retail prices. Damages will be based on the amount of the overcharge, generally "measured by the difference between the price paid and what the market or fair price would have been" absent the violation. *Hanover Shoe*, 392 U.S. at 489-90 (citing *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390, 396 (1906)). The overcharge is not the increased commission itself, but the increase in the retail price paid directly by consumers of which the commission is a part.[14]

App developers would proceed on a "lost profits" basis analogous to the theory that any seller would assert in response to monopolized (or monopsonized) distribution.[15] They would be damaged by reduced sales due to higher retail prices and a reduced margin on each sale. This is not duplicative of consumers' damages from higher retail prices, even if the overcharge to consumers is entirely a product of the monopsony effect on app developers. *See* Roger D. Blair & Jeffrey L. Harrison, *Antitrust Policy and Monopso-*

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[14] As respondents point out, "the overcharge has not been passed on by anyone to anyone." Resp. Br. 39. To be sure, establishing but-for retail prices may require respondents to show how app developers would have priced their apps if faced with lower-cost, or less-restricted, forms of distribution. But that is common in antitrust cases. *See infra* at pp. 26-28.

[15] In the unlikely event that app developers were to sue and seek overcharge damages as purchasers of Apple's distribution services, duplicative damages would be avoided either because consumers would be considered "the" direct purchaser, *see supra* note 8, or app developers' overcharge (increase in cost) would be equal to the reduction in payments they actually receive.

ny, 76 Cornell L. Rev. 297, 338 (1991) ("[T]here is no apportionment or multiple liability problem in the case of damages [to sellers and purchasers] due to . . . monopsony . . . ."). [16] Moreover, app developers' lower profits from app sales may reduce developer's incentives to create new iOS apps or to improve existing ones via updates and fixes—the way that a higher marginal tax rate reduces the incentive of the taxpayer to generate income. Again, there is injury to developers in the form of lost profits on new apps that developers would have created and submitted to Apple for sale.

C. Respondents' Proof of Damages Would Not Be Unmanageable

Apple argues that analyzing respondents' claim would present insuperable complexities: there are "millions of apps sold—and priced—by tens of thousands of iOS developers . . . perform[ing] thousands of different functions, in competition with countless different potential substitutes." Pet. Br. 27. According to Apple "demand and supply elasticities would need to be estimated . . . on a scale never before imagined, let alone undertaken." *Id.*

Apple's hyperbole is unpersuasive. As respondents point out, app developers' lost-profits claims would require the same kind of estimation as respondents' overcharge claim here. Resp. Br. 45. Indeed, Apple confronted a similar situation in the "eBooks" conspiracy case. In 2011, private plaintiffs—eBooks purchasers—sued Apple for damages, alleging

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[16] But, as respondents point out, the exclusivity and tiered-pricing provisions of Apple's distribution monopoly may also drive up prices by reducing competition among app developers. *See* Resp. Br. 41.

that Apple orchestrated a conspiracy with publishers to fix the prices for books sold online. *Elec. Books*, 859 F. Supp. 2d at 673. A later-filed enforcement action by the United States and 33 States was tried, and the district court held that Apple violated the Sherman Act. *United States v. Apple Inc.*, 952 F. Supp. 2d 638 (S.D.N.Y. 2013), *aff'd*, 791 F.3d 290 (2d Cir. 2015).

The private plaintiffs and various States continued their damages claims against Apple and the publishers on behalf of persons who purchased eBooks from Apple. Plaintiffs' damages required a determination of the but-for price of eBooks. On class certification, the plaintiffs' expert analyzed "transaction records for more than 149 million sales of 1.3 million different titles." *In re Elec. Books Antitrust Litig.*, No. 11-md-2293, 2014 WL 1282293, at *9 (S.D.N.Y. Mar. 28, 2014) ("*eBooks Class Cert. Decision*"). The analysis covered eBooks offered by five major publishers, marketed in various trade categories, and sold at different price tiers on the websites of seven eBook vendors. *See id.*; *United States v. Apple, Inc.*, 791 F.3d 290, 296 (2d Cir. 2015).

Apple opposed class certification, arguing that "each of the *150 million* e-book purchases . . . has its own unique history and must be evaluated separately." *eBooks Class Cert. Decision*, 2014 WL 1282293, at *14 (internal quotation marks omitted). Unpersuaded, the court certified a purchaser class: plaintiffs' expert's multivariate regression analysis properly "disentangled the effect of collusion on e-book prices, generating a model that explains 90% of the variance among titles' pricing." *Id.* The litigation subsequently settled with Apple and the publishers paying, in the aggregate, more than $560 million. Final Report Regarding Consumer Distribution, *In re Elec. Books An-*

titrust Litig., No. 11-md-02293 (S.D.N.Y. June 21, 2018), ECF No. 698. Similarly, in *In re High-Tech Employee Antitrust Litig.*, a wage-fixing antitrust case, defendants argued that compensation was "highly individualized with wide variation . . . set by hundreds of different managers who were directed to differentiate pay." 985 F. Supp. 2d 1167, 1214 (N.D. Cal. 2013). But problems of proof of damages did not prevent denial of summary judgment, a grant of class certification or approval of settlements of over $420 million. *In re High-Tech Employee Antitrust Litig.*, No. 11-CV-02509-LHK, 2015 WL 5158730, at *16 (N.D. Cal. Sept. 2, 2015).

Likewise, the DOJ and FTC often litigate proposed mergers of companies that sell a large array of products based on analyses of the transaction's probable price effects.[17] Expert analysis focuses on whether the merger might raise prices overall to *retail customers* and, if so, by how much. These cases similarly illustrate that econometric tools are up to the task here.

IV. THIS COURT SHOULD NOT REVISIT *ILLINOIS BRICK* AND *HANOVER SHOE*

The United States points out that since *Illinois Brick* was decided, many States have authorized indirect purchasers to sue under their own state anti-

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[17] *See, e.g., FTC v. Advocate Health Care Network*, 841 F.3d 460, 467–68 (7th Cir. 2016) (hospital services—a "cluster" product market where customer demand is measured across a suite of products rather than individual products) (citing authorities); *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028 (D.C. Cir. 2008) (grocery store items); *FTC v. Staples, Inc.*, 190 F. Supp. 3d 100, 117 (D.D.C. 2016) (office supply superstores "cluster[ing] consumable office supplies into one market for analytical convenience").

trust laws. *See* U.S. Br. 18. The benefits and costs of the resulting system of related parallel federal and state antitrust cases are matters of on-going debate. *Id.* at 18-19. The Antitrust Modernization Commission recommended federal legislation to abrogate *Hanover Shoe* and *Illinois Brick*, permit indirect purchaser suits, and apportion damages. *See* Antitrust Modernization Comm'n, Report and Recommendations vi-vii, 18, 265-83 (Apr. 2007) ("AMC Report"). AAI was critical of the AMC's recommendations because the proposal, as crafted, would have reduced deterrence. And the AMC's critique of the existing system failed sufficiently to account for the then-recent enactment of the Class Action Fairness Act ("CAFA"), which expanded federal jurisdiction over class actions asserting state law claims, including antitrust claims arising in "repealer" States. *See* 28 U.S.C. § 1332(d). CAFA, together with existing multi-district procedures, *see* 28 U.S.C. §§ 1407 et seq., allow both federal and state antitrust claims to be heard in federal court by a single judge, assigned for all pretrial purposes.

In any event, like the United States and other amici of petitioners, we agree that "the only question presented is how to apply [*Hanover Shoe* and *Illinois Brick*] here." U.S. Br. 19; *see also* Amicus Br. of Washington Legal Foundation 8-17. Whether further change is warranted is appropriately left to Congress.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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No. 17-204

IN THE
Supreme Court of the United States

APPLE INC.,
Petitioner,

v.

ROBERT PEPPER, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF ANTITRUST SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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IN THE

Supreme Court of the United States

NO. 17-204

APPLE INC.,

Petitioner,

v.

ROBERT PEPPER, *et al.*,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF ANTITRUST SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are leading scholars with decades of experience in antitrust law and economics. They have studied and written numerous articles, book chapters, and other papers about *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968); *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977); or other significant anti-

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[1] No counsel for a party authored this brief in whole or in part; no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief; and no person other than *amici* and their counsel made such a contribution. Letters consenting to the filing of this brief have been filed with the Clerk.

trust cases, as well as the policy effects of those decisions on markets. *Amici* thus have a strong interest in the sound development of antitrust law.

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Herbert Hovenkamp is the James G. Dinan University Professor at the University of Pennsylvania Law School and the Wharton School. Long recognized as a leading antitrust scholar, Professor Hovenkamp has published scores of books, articles, and other writings in the field, including the seminal Philip E. Areeda and Herbert Hovenkamp antitrust treatise, *Antitrust Law*, which this Court has cited on numerous occasions. See, *e.g.*, *Ohio* v. *Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018); *Am. Needle, Inc.* v. *Nat'l Football League*, 560 U.S. 183, 190-191 & n.2 (2010); *Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 894 (2007).

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Tim Wu is the Silver Professor of Law, Science, and Technology at Columbia Law School. He is a leading scholar in the fields of antitrust, intellectual property, and communications law. In addition to his scholarship,

Professor Wu has served as an advisor to the Federal Trade Commission and the White House National Economic Council.

Amici respectfully submit this brief to emphasize the important policy ramifications of the issues presented. The views expressed are those of the individual *amici* and not of their affiliated organizations.

SUMMARY OF ARGUMENT

For over forty years, this Court's decision in *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), has prohibited indirect purchasers—*i.e.*, those who do not transact directly with an alleged antitrust violator—from bringing treble-damages suits under the Clayton Act. Petitioner seeks a novel expansion of that rule. In petitioner's view, even those who buy goods or services directly from an antitrust violator should not be permitted to sue that violator for damages if a third party had some role in setting the price they paid. That expansion would unduly restrict private treble-damages actions—a key element of the enforcement regime Congress designed.

I. The Sherman Act created a private right of action allowing parties injured by violations to sue for treble damages. The Clayton Act contains a similar provision. Those provisions reflect Congress's intent that private actions would form a central component of enforcement of the antitrust laws. In keeping with that design, private parties file the vast majority of antitrust actions.

Maintaining robust private enforcement of the antitrust laws is even more important in the current market. The last several decades have seen rising concentration—and decreasing competition—across nearly all industries, creating opportunities for abuse of market power and antitrust violations. The markets in which Apple

participates are no exception: The mobile app, smartphone, personal computing, operating system, and mobile operating system markets are all highly concentrated, with Apple holding significant market share.

II. Petitioner's proposed expansion of *Illinois Brick* threatens the private enforcement regime Congress designed. This Court has long emphasized the importance of ensuring that *some* party with an incentive to sue is able to seek enforcement of the antitrust laws. Those concerns are justified: The number of parties with incentives to sue monopolists like Apple is already limited. Some commercial purchasers fear disrupting vital supply relationships. Others have no economic incentive to sue because antitrust violators share monopoly profits with them. Expanding the direct-purchaser rule as petitioner suggests would further limit the pool of potential plaintiffs, threatening to eliminate private enforcement altogether for certain violations.

Petitioner's rule would also draw arbitrary distinctions between direct purchasers. Petitioner claims that *Illinois Brick* requires the selection of *one* appropriate plaintiff. But this Court has never announced such a rule. Court after court has recognized that, where an antitrust violator directly harms multiple parties in different markets, each victim may be a direct purchaser who may sue for the distinct harm it suffered. Arbitrarily excluding one set of direct purchasers threatens underdeterrence in an era when multisided markets are increasingly common.

Petitioner's theory would further undermine enforcement by permitting monopolists and cartelists to avoid liability through clever transaction structuring. Economically identical transactions could be recast to vest sole "direct purchaser" status in the party least likely to sue.

Retaining this Court's bright-line *Illinois Brick* rule—in which any party that transacts directly with an antitrust violator may sue for damages—would avoid such gamesmanship.

III. Expanding *Illinois Brick* as petitioner requests would make even less sense in light of developments over the intervening decades. This Court adopted the direct-purchaser rule based on perceived difficulties in apportioning overcharges and the potential for duplicative recoveries. But over the decades since, state law has evolved to permit indirect-purchaser actions that are barred under federal law, and those cases are routinely heard in federal court. Courts will thus confront such issues regardless of what the Court decides in this case.

Advances in economic analysis also mitigate many of the Court's concerns in *Illinois Brick*. That decision sought to simplify damages calculations in light of the primitive state of econometric methodology at the time. But advances in econometrics over the last forty years have made it relatively straightforward for economists to determine antitrust damages in complex commercial environments where multiple parties interact. Courts routinely apply those methods of calculating damages without significant difficulty. For that reason too, there is no justification for further expanding *Illinois Brick*.

ARGUMENT

This private antitrust suit falls squarely within the traditional class of direct-purchaser actions permitted by *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977). Petitioner acknowledges that "Apple distributes"—*i.e.*, sells—"apps 'directly' to consumers via the App Store." Pet. Br. 34. But petitioner nonetheless asserts that those customers are not direct purchasers for purposes of *Illinois Brick* because—contrary to the well-accepted inter-

pretation of that decision—the immediate buyer of a product does not qualify as a direct purchaser if a third party is "setting the price." *Id.* at 37. According to petitioner, because developers rather than Apple set the price for apps in the App Store, the customers who buy those apps directly from Apple are not direct purchasers and therefore cannot seek damages for Apple's anticompetitive conduct. See *id.* at 37-38.

The rule that petitioner seeks is not an interpretation of *Illinois Brick* but an expansion of it. Petitioner invites the Court to adopt a rule that certain consumers, although direct purchasers, cannot sue for damages if a third party was involved in setting the price for the product. That extension of *Illinois Brick* would severely limit the pool of potential private enforcers and, in many cases, eliminate private enforcement altogether.

I. HEALTHY MARKET COMPETITION DEPENDS ON PRIVATE ANTITRUST ENFORCEMENT

A. Private Actions Are Crucial to Successful Enforcement of the Antitrust Laws

From the outset, Congress designed the antitrust laws to rely on private enforcement to deter anticompetitive behavior. As originally enacted, the Sherman Act provided that any person "injured in his business or property" by a violation could "sue therefor * * * and shall recover threefold the damages by him sustained, and the costs of suit." An Act To Protect Trade and Commerce Against Unlawful Restraints and Monopolies, § 7, 26 Stat. 209, 210 (1890). That provision now appears as Section 4 of the Clayton Act, while Section 5 expressly grants preclusive effects in private actions to prior judgments obtained by the United States. See Clayton Antitrust Act of 1914, Pub. L. No. 63-212, §§ 4, 5, 38 Stat. 730, 731 (codified at 15 U.S.C. §§ 15(a), 16(a)).

The antitrust laws thus seek to promote competition by creating a two-track enforcement regime, with private actions "supplement[ing] public enforcement, which is inevitably selective." 2A Phillip E. Areeda & Herbert Hovenkamp, *et al.*, *Antitrust Law* ¶330b, at 41 (4th ed. 2014); see also 1 Earl W. Kintner & Joseph P. Bauer, *et al.*, *Federal Antitrust Law* §4.18, at 241-242 (1980) (Sherman Act "surpassed the common law" by creating a private right of action for treble damages). "The interest in wide and effective enforcement has * * *, for [over] a century, been vindicated by enlisting the assistance of 'private Attorneys General,'" and this Court has "always attached special importance to their role because 'every violation of the antitrust laws is a blow to the free-enterprise system envisaged by Congress.'" *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 653-654 (1985) (alteration omitted) (quoting *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 262 (1972)); see also *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 343 (1979) ("[T]he leading proponents of the legislation perceived the treble-damages remedy * * * as a means of protecting consumers * * *."); *Ill. Brick*, 431 U.S. at 745 (noting the "longstanding policy of encouraging vigorous private enforcement of the antitrust laws").

Private enforcement is crucial "not merely to provide private relief" to injured consumers but also "to serve * * * the high purpose of enforcing the antitrust laws." *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 130-131 (1969); see William Breit & Kenneth G. Elzinga, *Antitrust Enforcement and Economic Efficiency: The Uneasy Case for Treble Damages*, 17 J.L. & Econ. 329, 329 (1974) (private enforcement actions are "the strongest pillar" and "foundation" of antitrust law (quotation marks omitted)). While government regulators

may seek to enjoin antitrust violations, only private parties may seek treble damages. See 15 U.S.C. §§ 15(a), 15a. That remedy is critical to ensuring adequate deterrence. By "generat[ing] a powerful financial incentive for injured persons to detect, disclose, attack, and end violations of the antitrust laws," the threat of treble damages "offset[s] the probability that a secret violation may not be detected and prosecuted." 2A Areeda & Hovenkamp, *supra*, ¶330b, at 40-41.

Indeed, absent the threat of treble damages, defendants would often have strong incentives to violate the antitrust laws and simply pay any penalty imposed. "For example, if damages for cartel price fixing were limited to the overcharge, prospective cartel members would think it profitable to enter the cartel if there is any substantial likelihood that they would not be caught," because, "[a]t worst, they would merely have to pay back the cartel's illegal earnings." 2A Areeda & Hovenkamp, *supra*, ¶330b, at 40.[2]

Private parties are also more likely than the government to have information about antitrust violations, and are thus in a better position to detect violations. See *Paper Sys. Inc.* v. *Nippon Paper Indus. Co.*, 281 F.3d 629, 632-633 (7th Cir. 2002) (allowing private plaintiffs "to collect the full overcharge, trebled, creates powerful incentives to investigate and file suit" because "[f]irms that deal directly with * * * manufacturers are apt to know the most about the industry's behavior and thus are in

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[2] Preserving effective private enforcement is especially important in price-fixing cases—the core of anticompetitive conduct and the context in which *Illinois Brick* arose. Even antitrust skeptics agree that the *per se* rule against price-fixing has made "enormous" "contributions to consumer welfare over the decades." Robert H. Bork, *The Antitrust Paradox* 263 (2d ed. 1993).

the best position to detect cartels"); Steven Shavell, *Foundations of Economic Analysis of Law* 578-581 (2004) (discussing government and private incentives to sue in tort-litigation context). "Private enforcement thus increases the likelihood that a violator will be found out, and greatly enlarges the penalties and thereby helps discourage illegal conduct." 2A Areeda & Hovenkamp, *supra*, ¶330b, at 41.

Consistent with Congress's two-track enforcement structure, today most antitrust enforcement actions are brought by private parties rather than regulators. Private litigation accounted for about 90% of antitrust filings in federal court each year between 1975 and 2012. See Hindelang Criminal Justice Research Ctr., Univ. at Albany, *Sourcebook of Criminal Justice Statistics Online: Antitrust Cases Filed in U.S. District Courts* (2012), https://www.albany.edu/sourcebook/pdf/t5412012.pdf; compare U.S. Courts, *Table C-2A*, http://www.uscourts.gov/sites/default/files/data_tables/jb_c2a_0930.2017.pdf (approximately 650-700 civil antitrust cases filed in federal courts per year from 2013 to 2017), with U.S. Dep't of Justice, *Antitrust Div. Workload Statistics FY 2008-2017*, at 5-6, https://www.justice.gov/atr/file/788426/download (approximately 40-110 civil and criminal cases filed by DOJ Antitrust Division per year from 2008 to 2017).

Empirical studies have confirmed that those private enforcement actions are effective in deterring anticompetitive behavior. See, *e.g.*, Robert H. Lande, *et al.*, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F. L. Rev. 879, 893-894 (2008) ("[P]rivate litigation provides more than four times the deterrence of the criminal fines * * *."). That result is unsurprising. As this Court has explained, government

regulators may obtain only "one injunction" against a violator. *Hawaii* v. *Standard Oil Co. of Cal.*, 405 U.S. 251, 261 (1972). But "[t]he position of a defendant faced with numerous claims for damages is much different." *Ibid.*[3]

B. Private Actions Are Particularly Important in Light of Increasing Market Concentration

Rigorous private enforcement is all the more important today because of increasing concentration across a wide variety of industries. Recent studies provide strong evidence that the American economy has become significantly less competitive.

From 1997 to 2014, the average Herfindahl-Hirschman Index ("HHI"), a measure of market concentration, increased from just under 800 to almost 1200—a nearly 50% increase. Gustavo Grullon, *et al.*, *Are U.S. Industries Becoming More Concentrated?* 8-9, 48 (Social Science Research Network, Working Paper, June 2018). HHI increased in 80% of all industries, and in some, the increase was massive. See *id.* at 11.

The markets in which Apple transacts are no exception. The mobile app store market appears to be a duo-

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[3] Concerns that private antitrust actions lead to excessive damages, overdeter, or duplicate government actions are unfounded. The most careful research suggests the opposite: Plaintiffs are normally *under*compensated. See, *e.g.*, John M. Connor & Robert H. Lande, *Not Treble Damages: Cartel Recoveries Are Mostly Less Than Single Damages*, 100 Iowa L. Rev. 1997, 1998 (2015) (finding that most victims receive damages *less* than the overcharge). Conversely, statistical evidence shows that government agencies have underenforced antitrust laws by failing to block mergers that proved to have anticompetitive effects. See Carl Shapiro, *Antitrust in a Time of Populism*, Int'l J. Indus. Org., at 25 (forthcoming 2018) (observing that there is "little evidence that mergers increase efficiency through rationalization of production across plants or through savings in administrative costs" despite agency enforcement).

poly occupied by Apple and Google, and with respect to iPhone owners who seek to purchase apps, Apple's app store is effectively a monopoly. The smartphone market is dominated by only six manufacturers, including Apple. Eighty percent of the U.S. market for personal computers is shared by five firms, including Apple. Apple and Microsoft share approximately ninety percent of the U.S market for computer operating systems. And Apple and Google share virtually 100% of the U.S. market for mobile operating systems.[4]

Other measures confirm the reduction in competition. "Markups"—the amount by which a firm sets prices above marginal cost—have risen precipitously. From 1980 to 2014, the average markup across the United States economy nearly quadrupled from 18% to 67%. See Jan De Loecker & Jan Eeckhout, *The Rise of Market Power and the Macroeconomic Implications* 2 (Nat'l Bureau of Econ. Research, Working Paper No. 23687, Aug. 2017). In that environment, the need for effective private enforcement is even more acute.

II. Extending *Illinois Brick* To Bar Suits By Certain Direct Purchasers Would Cripple Private Antitrust Enforcement

Given the importance of private antitrust actions in Congress's enforcement scheme and the increasing threat of market concentration, it is all the more important to secure effective remedies for injured consumers. Petitioner's theory, however, would have precisely the opposite effect: By arbitrarily treating certain direct

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[4] The data in this paragraph is from Statistica, an analytics software package that provides market research information. See Statistica, www.statistica.com (last visited Sept. 25, 2018).

purchasers as if they were indirect purchasers, it would seriously undermine effective enforcement.

A. Petitioner's Proposed Rule Would Threaten To Eliminate Enforcement by the Only Parties with Incentives To Sue

In *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968), this Court expressed concern that antitrust violators could "retain the fruits of their illegality" if "no one was available who would bring suit against them." *Id.* at 494. The Court was so concerned with preserving the effectiveness of private actions that it was willing to allow direct purchasers to sue for the entire overcharge despite the possibility that they might have passed on a portion to their customers. See *id.* at 488, 494.

In *Illinois Brick*, the Court recognized that "direct purchasers sometimes may refrain from bringing a treble-damages suit for fear of disrupting relations with their suppliers," although it concluded "on balance" that vesting the entire damages remedy in direct purchasers would encourage vigorous enforcement. 431 U.S. at 746. In striking that balance, the Court remained "concerned not merely that direct purchasers have sufficient incentive to bring suit under the antitrust laws * * * but rather that at least *some party* have sufficient incentive to bring suit." *California* v. *ARC Am. Corp.*, 490 U.S. 93, 102 n.6 (1989) (emphasis added) (describing *Illinois Brick*); see *Ill. Brick*, 431 U.S. at 745-746 ("[T]he longstanding policy of encouraging vigorous private enforcement of the antitrust laws supports our adherence to the *Hanover Shoe* rule, under which direct purchasers * * * are permitted to recover the full amount of the overcharge." (citation omitted)).

Those concerns were well-founded. Many direct purchasers are "highly unlikely to sue" because they think they would be better off permitting an antitrust violation to continue rather than risking their relationship with the alleged violator. Herbert Hovenkamp, *The Rationalization of Antitrust*, 116 Harv. L. Rev. 917, 941 (2003). Where an upstream party has market power—always the case with a monopolist—its customers may have "few, if any, alternative sources of supply," and will thus be "reluctant to risk their relationships with suppliers by initiating major antitrust litigation against them." Andrew I. Gavil, *Thinking Outside the* Illinois Brick *Box: A Proposal for Reform*, 76 Antitrust L.J. 167, 192 (2009). By artificially narrowing the class of direct purchasers, petitioner's rule would seriously aggravate those concerns.

Petitioner asserts that it is "highly unlikely" that "developers may be afraid to sue Apple." Pet. Br. 32 n.13. But experience suggests the opposite. In *Campos* v. *Ticketmaster Corp.*, 140 F.3d 1166 (8th Cir. 1998), for example, after the Eighth Circuit dismissed a suit by concert-ticket purchasers on grounds similar to those petitioner advances here, the concert venues never sued Ticketmaster. See Joseph P. Bauer, *The Stealth Assault on Antitrust Enforcement: Raising the Barriers for Antitrust Injury and Standing*, 62 U. Pitt. L. Rev. 437, 447 (2001) ("The consequence of the Eighth Circuit's holding was that the only private parties who had any incentive to bring a lawsuit, and any basis for asserting that they were harmed, were barred from bringing a treble damage action."). Other examples abound. See, *e.g.*, Mem. from the Antitrust Modernization Comm'n Staff to All Comm'rs 13 (May 4, 2006), https://govinfo.library.unt.edu/amc/pdf/meetings/CivRem-IndP_DiscMemo060504-fin.pdf (citing cases brought by indirect purchasers where

no direct purchaser or government agency sued); Am. Antitrust Inst., *Comments of the American Antitrust Institute Working Group on Remedies to the Antitrust Modernization Commission* 19 (June 17, 2005), https://govinfo.library.unt.edu/amc/public_studies_fr28902/remedies_pdf/AAI_Remedies.pdf (discussing another case in which "no direct purchaser * * * ha[d] sued in the two years since the case was filed by indirect purchasers"); see also Gavil, *supra*, at 191 n.73 (similar).

Moreover, whether or not developers would "fear" bringing a lawsuit, a monopolist like Apple can remove any incentive to sue simply by sharing a portion of the monopoly profits. See Barak D. Richman & Christopher R. Murray, *Rebuilding* Illinois Brick*: A Functionalist Approach to the Indirect Purchaser Rule*, 81 S. Cal. L. Rev. 69, 94 (2007). "[A]n upstream cartel can prevent private litigation as long as it assures that its direct purchasers downstream benefit more from the existence of the cartel than they can claim antitrust damages for," so that "[t]he cartel is effectively shielded from exposure through private litigation * * *." Maarten Pieter Schinkel, *et al.*, *Illinois Walls: How Barring Indirect Purchaser Suits Facilitates Collusion*, 39 RAND J. Econ. 683, 684-685 (2008). The benefits from acquiescing in a monopolist's conduct may be particularly easy to accept when the purchaser can simply foist off any overcharges on another party to the transaction. See Roger D. Blair & Jeffrey L. Harrison, *Reexamining the Role of* Illinois Brick *in Modern Antitrust Standing Analysis*, 68 Geo. Wash. L. Rev. 1, 33 (1999) (direct purchaser's motivation to sue can depend on ability to pass on overcharge).[5]

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[5] Courts have held that *Illinois Brick* does not bar suits by indirect purchasers where "the manufacturer and the intermediary are both alleged to be co-conspirators." *Fontana Aviation, Inc.* v. *Cessna*

Monopolists, for example, can ration sales among purchasers, creating artificial scarcity and allowing favored purchasers to reap some of the monopoly profits through higher prices. See Schinkel, *et al.*, *supra*, at 685. Economists have suggested that De Beers used just such a rationing system to insulate itself from price-fixing liability, "offer[ing] sorted bundles of rough diamonds to a small group of selected clients" who would then process and resell those diamonds. *Id.* at 695. No private party filed an antitrust case against De Beers until after the Department of Justice brought its own case. See *ibid.*

Microsoft's agreements with purchasers likewise allowed it to maintain its monopoly on Intel-compatible operating systems. See *United States* v. *Microsoft*, 253 F.3d 34 (D.C. Cir. 2001) (affirming finding that Microsoft illegally maintained monopoly). The main direct purchasers of those operating systems were computer original-equipment manufacturers, who had "complex, ongoing relationship[s] with Microsoft," Hovenkamp, *supra*, at 941, and lacked alternative suppliers, see Ramona Mateiu, In re Microsoft Corp. Antitrust Litigation, 17 Berkeley Tech. L.J. 295, 307-308 (2002). In exchange for agreeing to exclusionary provisions in their contracts with Microsoft, the manufacturers "received various benefits, including discounts, cooperation in development, and greatly enhanced computer sales via the continuous

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Aircraft Co., 617 F.2d 478, 481 (7th Cir. 1980); see also *Lowell* v. *Am. Cyanamid Co.*, 177 F.3d 1228, 1232 (11th Cir. 1999) ("*Illinois Brick* does not apply to a single vertical conspiracy where the plaintiff has purchased directly from a conspiring party in the chain of distribution."); *Arizona* v. *Shamrock Foods Co.*, 729 F.2d 1208, 1212-1213 (9th Cir. 1984) (similar). But monopolists can discourage suits by sharing benefits from the illegal behavior with their counterparties without expressly colluding with them. See Schinkel, *et al.*, *supra*, at 685.

upgrading" demanded by Microsoft's hardware requirements. 2A Areeda & Hovenkamp, *supra*, ¶346f, at 196; see also *Dickson* v. *Microsoft Corp.*, 309 F.3d 193, 222 (4th Cir. 2002) (Gregory, J., dissenting) (noting allegations that "Microsoft shared some of the monopoly profits with the [original-equipment manufacturers]"). Unsurprisingly, even after a successful government enforcement action, no original-equipment manufacturer sued Microsoft. See *In re Microsoft Corp. Antitrust Litig.*, 218 F.R.D. 449, 451 (D. Md. 2003); 2A Areeda & Hovenkamp, *supra*, ¶346f, at 196 n.46. One manufacturer even urged Texas *not* to join the federal government's case. See Mateiu, *supra*, at 309 n.115.

By stretching *Illinois Brick* so it blocks damages suits by large categories of injured consumers despite the fact that they are direct purchasers, petitioner's rule would seriously aggravate the problem of insulating antitrust violations from liability because no party would have an incentive to sue.

B. Petitioner's Proposed Rule Would Create Arbitrary Distinctions Among Direct Purchasers

Petitioner's rule would also lead to arbitrary distinctions. It would allow *certain* direct purchasers to pursue a claim while denying any remedy to *other* direct purchasers, without any adequate justification for the disparate treatment.

As petitioner acknowledges, the App Store is a two-sided platform that sells to two different markets. See Pet. Br. 7-8 ("Apple structured the App Store as a[ ] * * * two-sided marketplace for connecting developers and consumers."). Apple sells distribution services upstream to developers, and it sells apps downstream to consumers. Respondents are suing with respect to the *downstream* overcharge; they are not seeking damages for any

upstream overcharge that developers may pass on to consumers. The fact that both overcharges may be reflected in the ultimate price, and that this price is set by the developer, is irrelevant to consumers' status as direct purchasers under *Illinois Brick*.

Petitioner claims that *Illinois Brick* requires courts to find the "*one* appropriate plaintiff group among the categories of possible plaintiffs." Pet. Br. 32. But *Illinois Brick* has no such requirement. Multiple plaintiffs or groups of plaintiffs may sue antitrust violators so long as they are all direct purchasers.

Courts have repeatedly held that, where multiple parties transact with the antitrust violator in different markets (for example, both upstream and downstream), there can be multiple direct purchasers. See, *e.g.*, *Loeb Indus., Inc.* v. *Sumitomo Corp.*, 306 F.3d 469, 481 (7th Cir. 2002) ("[D]ifferent injuries in distinct markets may be inflicted by a single antitrust conspiracy * * * ."); *In re Mercedes-Benz Anti-Trust Litig.*, 364 F. Supp. 2d 468, 482 (D.N.J. 2005) (lessees and leasing companies could both sue car dealerships for artificially inflating prices of leased vehicles, but for different damages); see also *Blue Cross & Blue Shield United of Wis.* v. *Marshfield Clinic*, 65 F.3d 1406, 1414 (7th Cir. 1995) (affirming judgment in favor of insurance company that paid providers while noting that, if patients were the ones who paid the fees, they would be the ones who could sue); *Med. Sav. Ins. Co.* v. *HCA, Inc.*, No. 2:04-CV-156, 2005 WL 1528666, at *8 (M.D. Fla. Jun. 24, 2005) (patients were "direct purchasers" because they paid overcharges to healthcare provider, even though insurers also paid portion of bill).

Illinois Brick applies only where "Party A, the antitrust violator, sells to Party B, and then Party C, a downstream purchaser from B, seeks to recover the implicit

overcharges that B passed on to C." *Loeb Indus.*, 306 F.3d at 482. If Party A sells most of its widgets directly to Party B for retail distribution, but also sells some widgets directly to consumers (Party C), *both* parties would be direct purchasers entitled to sue for their own distinct injuries. Nothing in *Illinois Brick* permits a court to pick only "*one*" of those direct purchasers and deem that party the "appropriate plaintiff." Pet. Br. 32.

That developers rather than Apple may set the price for apps is not an adequate justification for depriving consumers of their right to sue for damages. Whether or not Apple participates in the pricing decision (for example, by requiring all prices for apps to end in ".99"), consumers are still harmed when they purchase an app directly from Apple at a price that has been inflated by Apple's own anticompetitive conduct. The damages remedy is compensation for the harm that consumers suffered as a result of Apple's antitrust violations. There is no reason why that compensation should depend on the precise mechanism by which the anticompetitive price was set.

Arbitrarily excluding certain direct purchasers from the damages remedy, moreover, would result in underdeterrence. Congress imposed a treble-damages remedy to ensure a strong disincentive for antitrust violations. If a violator was required to compensate only *some* of the direct purchasers harmed by its violations, it would face liability less than three times the total damage it caused, impairing the deterrent effect of the remedy. For that reason too, allowing only a *subset* of direct purchasers to sue Apple for the anticompetitive harm it caused would be contrary to Congress's design.

C. Extending *Illinois Brick* Would Enable Monopolists To Manipulate Transactions To Avoid Liability

Petitioner's theory would not only undermine enforcement by diluting the effectiveness of the treble-damages remedy. It would also enable violators to avoid liability altogether by structuring their transactions in ways that exploit the proposed rule.

Suppose, for example, that a manufacturer sold widgets to retailers, which in turn resold them to consumers. If the retailers colluded amongst themselves to fix prices, the consumers could sue the retailers to seek compensation for any overcharges they paid. The consumers would be direct purchasers of the retailers, and thus the suit would be permitted by *Illinois Brick*.

Under petitioner's theory, however, nothing would prevent the retailers from avoiding liability simply by restructuring the form of the transactions. Instead of purchasing widgets from the manufacturer, the retailers could claim they were providing "distribution services" to the manufacturer. On that theory, the consumers would be only indirect purchasers, and any suit would be barred by *Illinois Brick*.

The retailers would not even have to change the economic substance of the relationship to advance such an argument. In the ordinary case, the retailer might pay the manufacturer $10 for the widget and then resell it for $13. If the retailer wanted to recharacterize the transaction as a sale of "distribution services," it could collect $13 from the consumer, return $10 to the manufacturer, and keep the $3 difference as its fee for distribution services. The economic substance would be the same. Yet the retailers could pick whether they wanted the manufacturer or the consumer to be their "direct purchaser"—

presumably informed by their estimation of which party was less likely to sue.

Nothing in those scenarios turns on which party sets the price for the products. If the retailer is a monopolist and the manufacturer faces a competitive market, the price paid by the consumer will be the manufacturer's marginal cost ($10) plus the amount that reflects the retailer's monopoly power ($3)—$13 total. The retailer would be free to structure the transaction so that either the manufacturer or the retailer would set the price. The retailer could buy the product from the manufacturer for $10 and set the retail price at $13. Or the retailer could sell "distribution services" to the manufacturer for $3, in which case the manufacturer would set the price at $13 to cover its cost. The economic substance would be identical; once again, the only difference would be how the transaction is characterized.

Indeed, under petitioner's proposed expansion of *Illinois Brick*, if a distributor sold goods subject to a resale price maintenance agreement (an agreement "under which manufacturers or suppliers set the minimum resale prices to be charged by their distributors," *State Oil Co.* v. *Khan*, 522 U.S. 3, 11 (1997)), the distributor could escape liability to its customers by arguing that the customers are indirect purchasers because someone else (the manufacturer or supplier) set the price for the goods. Petitioner's rule thus incentivizes the use of potentially anticompetitive agreements as a means to evade liability. See *Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 892 (2007) (explaining potential anticompetitive effects of resale price maintenance agreements).

Perhaps a court would reject such obvious evasions, even under petitioner's theory, in the context of a tradi-

tional distribution chain. But the opportunities for manipulation are greatly enhanced in the context of more complex two-sided markets like the one petitioner claims to exist here. See Pet. Br. 35. Apple sells distribution services to developers, and it sells apps to consumers. If Apple can reclassify parties as direct or indirect purchasers based simply on how it chooses to characterize the transaction and structure the price-setting process, it will have every incentive to structure the transaction in a way that impedes private enforcement of the antitrust laws.

The traditional bright-line "direct purchaser" rule avoids those problems. The relationship between consumers and Apple bears all the indicia of a traditional direct-purchaser relationship. Consumers "enter" (*i.e.*, open and browse through) Apple's retail store, which is entirely controlled by Apple, not app developers. Apple collects products obtained from manufacturers (*i.e.*, app developers) and displays them in a manner that enables consumers to compare and evaluate them. Apple then administers the transaction with the consumer, collecting money and "delivering" (*i.e.*, giving access to) the product. The transaction is governed by a legally enforceable contract between Apple and the consumer. Respondents thus directly transact with Apple and are "direct purchasers" under *Illinois Brick*.

III. THE RATIONALES UNDERLYING *ILLINOIS BRICK* DO NOT SUPPORT ITS FURTHER EXPANSION

While expanding *Illinois Brick* as petitioner proposes would seriously impair enforcement of the antitrust laws, it would do little to advance the purposes of the doctrine. The rationales underlying *Illinois Brick* have eroded in the four decades since the case was decided. They do not support its further expansion. See *Corr. Servs. Corp.* v. *Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring)

(doctrine undermined by subsequent developments should not be expanded).

A. State-Law Antitrust Litigation Has Largely Eliminated Many of the Benefits *Illinois Brick* Was Intended To Provide

Illinois Brick sought to "eliminate the complications of apportioning overcharges between direct and indirect purchasers" and to "eliminate multiple recoveries." *Kansas* v. *UtiliCorp United Inc.*, 497 U.S. 199, 208, 212 (1990). Since *Illinois Brick* was decided, however, developments in state antitrust laws have fundamentally altered the antitrust landscape.

In the years following *Illinois Brick*, many States "began passing *Illinois Brick* 'repealers'—that is, statutes that specifically authorize[] indirect purchasers to recover damages under state antitrust laws." Antitrust Modernization Comm'n, *Report and Recommendations* 268 (Apr. 2007) ("*AMC Report*"); see, *e.g.*, Cal. Bus. & Prof. Code § 16750(a). In other States, courts interpreted existing laws to reach the same result. See *AMC Report*, *supra*, at 268-269. Today, "more than two-thirds of the States have authorized the use of pass-on analysis to apportion damages under their own antitrust laws." U.S. Br. 18. Litigation under those laws "has become increasingly common, especially since the mid-1990s." *AMC Report*, *supra*, at 269.

Some state-law antitrust suits remain in state court. But many are litigated in federal court through diversity or supplemental jurisdiction, particularly since Congress enacted the Class Action Fairness Act of 2005. See 28 U.S.C. § 1332(d); see also, *e.g.*, *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 607 (7th Cir. 1997) (Alabama-law indirect purchaser action removed to federal court on basis of diversity jurisdiction).

Accordingly, "federal courts now regularly entertain * * * issues involving passing-on under state law, which they are precluded from hearing under federal law by *Illinois Brick*." Edward D. Cavanagh, Illinois Brick: *A Look Back and a Look Ahead*, 17 Loy. Consumer L. Rev. 1, 2 (2004).

Petitioner's proposed expansion of *Illinois Brick* would thus do little to advance the doctrine's rationale. Even if this Court accepts the argument that Apple's customers are indirect purchasers (despite purchasing directly from Apple), the majority of those customers would still have equivalent remedies under state law, and many of those disputes would wind up in federal court regardless. The expansion that petitioner seeks would thus do little to relieve federal courts of supposedly complex apportionment issues and purported problems of duplicative recovery.

If anything, expanding *Illinois Brick* would *exacerbate* the problems this Court sought to mitigate. Such an expansion would further increase the wedge between federal and state law. The result would be an *increase* in complexity. See Gavil, *supra*, at 188 (differences between state and federal standing rules increase complexity). That would hardly serve this Court's goal of keeping antitrust litigation "within judicially manageable limits." *Associated Gen. Contractors of Cal.* v. *Cal. State Council of Carpenters*, 459 U.S. 519, 543 (1983).

B. Courts Are Now Well-Equipped To Address Damages-Allocation Problems

At the same time state law has evolved to erode *Illinois Brick*'s asserted benefits, economic analysis has advanced to eliminate many of the complications this Court perceived. Fifty years ago, this Court wrote that determining the effects of a monopolistic overcharge at differ-

ent levels of a distribution chain was a "task [that] would normally prove insurmountable." *Hanover Shoe*, 392 U.S. at 493. The same concern drove the holding nine years later in *Illinois Brick*. See 431 U.S. at 725 n.3, 731-732. But economic analysis has far advanced in the years since. For that reason too, the Court should not expand *Illinois Brick* as petitioner urges.

The Court was concerned in *Illinois Brick* that computing passed-on overcharges would require assessing demand and supply elasticities in combination with a host of complicated variables influencing pricing decisions. See 431 U.S. at 741-743. But "that is not the typical way in which passed-on damages are computed in litigation." 2A Areeda & Hovenkamp, *supra*, ¶346k, at 219. Experts typically calculate overcharges using the "generally accepted" "yardstick" or "before-and-after" methods. *Conwood Co.* v. *U.S. Tobacco Co.*, 290 F.3d 768, 793 (6th Cir. 2002); see, *e.g.*, *Eleven Line, Inc.* v. *N. Tex. State Soccer Ass'n*, 213 F.3d 198, 207 (5th Cir. 2000) ("[T]he two most common methods of quantifying antitrust damages are the 'before and after' and 'yardstick' measures."); see also 11 Kintner & Bauer, *supra*, §79.1, at 107-108 (describing both methods). The "yardstick" method compares prices paid by the plaintiff to prices paid by a comparable firm unaffected by the antitrust violation. See 2A Areeda & Hovenkamp, *supra*, ¶392f, at 383-384; 11 Kintner & Bauer, *supra*, §79.1, at 108-109 & nn.80-81 (collecting cases). The "before-and-after" method compares the plaintiff's prices paid before and after the monopolization or price-fixing activity. See 2A Areeda & Hovenkamp, *supra*, ¶392e, at 382-383; 11 Kintner & Bauer, *supra*, §79.1, at 107 & nn.76-78 (collecting cases). Those methods permit computation of the price the plaintiff would have paid but for the anticompetitive conduct "without

reference to the amount 'passed on' by the intermediary." 2A Areeda & Hovenkamp, *supra*, ¶346k, at 220-221; see also Richman & Murray, *supra*, at 98; Blair & Harrison, *supra*, at 29.

State courts have relied on economic analyses based on those methods to certify indirect-purchaser classes despite arguments that calculating damages would be too difficult. See, *e.g.*, *In re Fla. Microsoft Antitrust Litig.*, No. 99-27340, 2002 WL 31423620, at *8-10 (Fla. Cir. Ct. Aug. 26, 2002) (yardstick analysis would permit reasonable estimate of indirect-purchaser damages); *Gordon* v. *Microsoft Corp.*, No. 00-5994, 2001 WL 366432, at *11-12 (Minn. Dist. Ct. Mar. 30, 2001) (similar). A "large majority of courts considering the issue" have rejected "pass-through and overcharge arguments" against class certification. *In re S.D. Microsoft Antitrust Litig.*, 657 N.W.2d 668, 679 (S.D. 2003) (collecting cases).

There is now a broad consensus in the literature that standard econometric methods are fully capable of allocating damages among multiple parties injured by a single antitrust violation. See, *e.g.*, Jan Boone & Wieland Müller, *The Distribution of Harm in Price-Fixing Cases*, 30 Int'l J. Indus. Org. 265, 273-274 (2012) (developing framework for apportioning harm due to price-fixing); Leonardo J. Basso & Thomas W. Ross, *Measuring the True Harm from Price-Fixing to Both Direct and Indirect Purchasers*, 58 J. Indus. Econ. 895, 920 (2010) (outlining statistical method as an "alternative to actually trying to estimate the degree of pass-through and the subsequent harm further downstream"); Frank Verboven & Theon van Dijk, *Cartel Damages Claims and the Passing-On Defense*, 57 J. Indus. Econ. 457, 481-483

(2009) (applying model to 1980s and 1990s European vitamin cartel).[6]

Courts and scholars have thus "developed a sophisticated body of law and economic thought on the problem of computing downstream overcharges," albeit "primarily in state, rather than federal, antitrust cases." Mark A. Lemley & Christopher R. Leslie, *Antitrust Arbitration and* Illinois Brick, 100 Iowa L. Rev. 2115, 2119-2120 (2015). Courts have "exhibited a capacity to handle suits from indirect purchasers and to calculate pass-on damages." Richman & Murray, *supra*, at 99.

Courts and economists are similarly capable of estimating damages in a case like this. While this case would require the calculation of the harm caused to a *direct* purchaser on one side of a two-sided market, rather than the harm caused to an indirect purchaser in a distribution chain, the econometric methods developed to address the latter problem are more than adequate to address the former. For that reason as well, the complications the Court perceived in *Illinois Brick* are no justification for expanding the doctrine to cover various categories of direct purchasers.

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[6] See also Martijn A. Han, Maarten P. Schinkel & Jan Tuinstra, *The Overcharge as a Measure for Antitrust Damages* (Amsterdam Ctr. for Law & Econ., Working Paper No. 2008-08, 2008) (concluding that courts need not calculate and apportion direct-purchaser overcharges and that more accurate damage calculations can be derived through but-for economic analysis); Martin Hellwig, *Private Damage Claims and the Passing-On Defense in Horizontal Price-Fixing Cases: An Economist's Perspective* 26 (Max Planck Inst. for Research on Collective Goods, Working Paper No. 2006-22, Sept. 2006) (arguing that "the passing-on defense is actually irrelevant to a proper assessment of damages").

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted.

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In the Supreme Court of the United States

APPLE, INC.,

Petitioner,

v.

ROBERT PEPPER, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF BSA | THE SOFTWARE ALLIANCE AS *AMICUS CURIAE* SUPPORTING PETITIONER

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INTEREST OF THE *AMICUS CURIAE*

BSA | The Software Alliance is an association of the world's leading software and hardware technology companies. On behalf of its members, BSA promotes policies that foster innovation, growth, and a competitive global marketplace for commercial software and related technologies. Because a competitive marketplace is vitally important to promoting the innovation that has kept the United States at the forefront of software and hardware development, BSA members have a strong interest in the consistent and technologically neutral application of U.S. antitrust laws.[1]

BSA members are among the Nation's leading technology companies, producing the software that powers computer and telecommunication networks and that is employed by businesses and consumers in virtually every aspect of daily life. By virtue of their business models and the collaborative nature of the software industry, they frequently engage in transactions and arrangements that entail collecting revenue from other businesses that, in turn, interface directly with consumers. They accordingly have a particularly strong interest in the *Illinois Brick* doctrine and the many practical objectives it serves.

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[1] Pursuant to Rule 37.6, BSA affirms that no counsel for a party authored this brief in whole or in part and that no person other than BSA and its counsel made a monetary contribution to its preparation or submission. The parties' blanket consent letters to the filing of *amicus* briefs have been filed with the Clerk's office.

INTRODUCTION AND SUMMARY OF ARGUMENT

For over forty years—beginning with *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968), and continuing with *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977)—it has been settled that neither antitrust defendants nor plaintiffs may make use of the concept of pass-through damages.

Hanover Shoe rejected an antitrust defendant's attempt to avoid liability by claiming that the direct purchaser of the product had passed on to its customers the allegedly supracompetitive price it paid. Permitting direct purchasers to recover the entire damages award would, the Court recognized, result in a windfall to direct purchasers, but the Court concluded that "the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers rather than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it." *Illinois Brick*, 431 U.S. at 734-35.

The Court also expressed "an unwillingness to complicate treble-damages actions with attempts to trace the effects of the overcharge on the purchaser's prices, sales, costs, and profits, and of showing that these variables would have behaved differently without the overcharge." *Id.* at 725.

Illinois Brick, decided nine years later, involved the inverse situation: an indirect-purchaser plaintiff claiming that it had been harmed by the higher prices passed on by the direct purchaser. The Court explained that allowing both direct and indirect purchasers to recover would "create a serious risk of multiple liability for defendants" (431 U.S. at 730): indirect purchasers

would be able to collect damages (trebled) even when direct purchasers relying on *Hanover Shoe* had already had collected damages undiminished by pass-through (trebled). It was "unwilling to open the door to [such] duplicative recoveries" under the antitrust laws. *Id.* at 731.

The *Illinois Brick* Court also emphasized that "[t]he principal basis for the decision in *Hanover Shoe* was the Court's perception of the uncertainties and difficulties in analyzing price and output decisions" to determine whether and to what extent supracompetitive prices had been passed through to the indirect purchaser seeking to recover damages. 431 U.S. at 731-732.

The "*Illinois Brick* rule" is thus symmetrical. It preserves standing for a direct purchaser to recover damages for overcharges, whether or not those charges are passed along to downstream customers. And it prevents indirect purchasers, to whom overcharges have been passed on, from seeking recovery for antitrust injuries.

The Ninth Circuit's decision in this case throws this settled understanding into disarray by upholding an antitrust claim seeking to recover pass-through damages. The court of appeals held that end users who purchase smartphone applications from Apple's "App Store"—the app purchasers—may bring suit against Apple for monopolization of the market for app distribution, even though their claims depend on a pass-through theory—*i.e.*, that direct purchasers of Apple's distribution service (app sellers) passed on Apple's commissions to indirect purchasers (app purchasers). The court held that the *Illinois Brick* rule did not apply because Apple was a "distributor" of apps to consumers, and was not the apps' "manufacturer."

The court of appeals expressly acknowledged the possibility that, on its reasoning, app developers might themselves be considered to be direct purchasers of "distribution services" from Apple and thus *also* be entitled to bring an antitrust suit for the same allegedly improper 30% commission that the app purchasers challenge in this suit. Pet. App. 20a. And it ignored the complexity of determining what portion of the 30% commission was borne by app purchasers in the form of higher prices.

In other words, the lower court failed to explain why the concerns that motivated *Hanover Shoe* and *Illinois Brick* do not also preclude the pass-through damages theory here. Its holding should be reversed for three reasons.

First, the lower court's reasoning poses a serious threat to America's 21st-century information economy, in which the provider of an online platform—such as the App Store, a cloud storage service, or any operating system—can and often does serve as an intermediary between end users and sellers of software products and services. If these platform providers are subject to suit not only by the direct purchasers of their services, but also by end users alleging damages based on pass-through theories, their litigation exposure—and litigation costs—could skyrocket. The result would be increased wasteful litigation and reduced innovation.

Second, respondents' pass-through theory of damages is flatly incompatible with this Court's decisions in *Hanover Shoe* and *Illinois Brick*. Those decisions rule out *any* form of pass-through damages, based on well-founded concerns about the problems that would arise if pass-through theories were permitted. This Court has previously declined to recognize exceptions

to the direct purchaser rule based on the structure of particular markets, and it should do so here as well.

Third, stare decisis weighs strongly against retreating from the bright-line rule of *Illinois Brick*. Numerous companies in and outside the technology sector have relied on that rule to predict the legal implications of their business dealings, and their expectations would be considerably disrupted by a ruling making them subject to suit by an entirely new class of parties. There is no reason, let alone a sufficiently compelling one, to abandon *Illinois Brick* and invite these harmful consequences.

ARGUMENT

The Court Should Reaffirm *Illinois Brick*'s Across-The-Board Prohibition On Pass-Through Damages.

Hanover Shoe and *Illinois Brick Co.* establish a categorical rule that antitrust claims based on theories of pass-through damages, such as the theory applied by the court below, are never permissible. Carving out an exception to that rule would pose a grave threat to the many innovative technology companies that are using, and will use in the future as technology develops, a variety of different distribution models to connect consumers and software developers. The judgment below should be reversed.

A. A Wide Variety Of Distribution Models Are—And Will Be—Used To Make Software Available To Ultimate Users.

This case concerns one particular distribution model for digital goods—the "App Store" model, in which numerous app developers are able to sell their apps to consumers in a centralized marketplace main-

tained by a single platform provider (in this case, Apple). But Apple is only one of the many platform providers that use this sort of distribution model; many other platform providers use comparable models to distribute digital products to users—and as technology evolves, new models are devised and implemented.

Cloud computing providers are one important example. In addition to the online information storage solutions they provide, these companies often make third-party software tools available for use in conjunction with the information stored on the platform. A file storage provider, for instance, might enable the use of word processing or other applications on files stored on its system. Such systems allow users to access these additional software tools on an as-needed basis—with access mediated by the provider of the cloud services.

Similarly, software providers—such as the creators of computer operating systems or web browsers—frequently offer users the ability to add "plug-ins" or "add-ons" to their software by downloading those additional software tools to computers or other devices through a centralized "store" or database made available as a feature of the main product (*i.e.*, the operating system or the web browser). Again, consumers obtain the additional products from the developers that created those additional products—but the platform provider acts as the indispensible intermediary in the transaction.

These intermediated arrangements offer compelling benefits for platform providers, third-party software developers, end-users, and the public.

First, this intermediation allows the platform provider to ensure that additional software products are compatible with its platform and that users will

have a high-quality experience. When users obtain software from developers without intermediation, compatibility issues can often arise. To cite just one example, a developer might create its application for use with one version of a system, but fail to make it compatible with later, upgraded versions. And these sorts of compatibility problems can have spillover effects; the digital economy today is characterized by rapid prototyping, testing, iteration, and innovation, and it is essential that the platforms facilitating that economy are both flexible *and* stable.

Second, the platform provider often will have important business reasons for maintaining its direct relationship with users, such as enhancing its ability to market additional products and services. Providing compatible add-on features from third-party developers can be an effective way to accomplish that goal.

Third, intermediated distribution models afford third-party software developers an opportunity to reach the intermediary's customer base more easily. By making their add-on available via the platform provider, third-party software developers can introduce their offerings to new customers.

Fourth, distribution to users by the platform provider ensures that the platform provider can quickly provide users with any updates needed to protect customers' security or the functionality of software tools. For example, a security vulnerability found in a particular application can be quickly brought to the attention of users and addressed.

Finally, and relatedly, a digital distribution model promotes security by guarding against the possibility that faulty or compromised applications will make it to users in the first place. Platform providers like Apple

are able to impose rigorous security requirements on applications that must be met before applications can be sold or distributed through their platforms. And if applications are later found to be malicious, they can be quickly deleted from the platform, limiting their ability to affect additional users.

In sum, although this case involves Apple's app store—and the relationship between Apple, app users, and app developers—the type of distribution model employed here can be and is replicated in the context of other software products and services.

B. Restricting The *Illinois Brick* Rule Could Disrupt These Distribution Models And Deprive Businesses And Consumers Of Access To New Technological Tools.

1. Consumers and the economy at large benefit from digital distribution models that deviate from the manufacturer-versus-distributor distinction that may be present in other economic sectors. But the Ninth Circuit's view of the *Illinois Brick* rule would permit antitrust suits against "distributors"—even when consumer-plaintiffs are relying on a pass-through theory of damages.

The threat of duplicative antitrust liability would deter platform providers and other businesses in the information technology sector from using those models to connect users and software tool developers. The court of appeals' rigid application of its manufacturer-versus-distributor distinction thus poses a serious threat to the viability of the many new and innovative distribution models for goods and services being used in the information economy. This Court should reject that approach.

Under the Ninth Circuit's holding below, platform providers can now be sued *both* by purchasers alleging that they directly purchase goods or services from the providers *and* by third-party developers alleging that they purchase "distribution services" from the providers. That prospect of duplicative liability is anything but hypothetical: indeed, the lower court acknowledged it as a potential consequence of its ruling in this case—even though it is the precise result that the *Illinois Brick* rule is supposed to prevent.

The problem of multiple recoveries is compounded by the fact that the antitrust laws already provide for multiplied damages: Congress provided that an antitrust plaintiff is entitled to recover three times the amount of any damages proven. 15 U.S.C. § 4. Congress considered that particular level of damages appropriate to remedy antitrust violations and to "penaliz[e] wrongdoers and deter[] wrongdoing." *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485 (1977).

Allowing multiple recovery in antitrust cases would create the possibility of *sextupled* damages—thus creating a damages regime that differs considerably from what Congress intended. The massive potential liability inherent in a system permitting multiple recovery would also encourage more *in terrorem* lawsuits and settlements. This Court observed in *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 559 (2007), that the treble damages and significant discovery expenses involved in antitrust cases can "push cost-conscious defendants to settle even anemic cases before" they reach summary judgment or trial. If that is true under a system permitting one recovery of treble damages, it would be even more true of a system of multiple liability.

Given the undesirability and unfairness of multiple antitrust liability, the Court in *Illinois Brick* declared itself "unwilling to 'open the door to duplicative recoveries'" under the antitrust laws. 431 U.S. at 731 (quoting *Hawaii* v. *Standard Oil Co. of Cal.*, 405 U.S. 251, 264 (1972)). It should do the same here.

2. That result is especially appropriate because multiple liability is not the only threat posed by the court of appeals' approach. This Court has explained that "[t]he principal basis for the decision in *Hanover Shoe* was the Court's perception of the uncertainties and difficulties in analyzing price and output decisions * * * [and] the costs to the judicial system and the efficient enforcement of the antitrust laws of attempting to reconstruct those decisions in the courtroom." *Illinois Brick*, 431 U.S. at 731-732. Those same problems would result from the offensive use of a pass-through theory of damages. *Ibid.*

Antitrust cases already involve complex factual and economic issues, which make these claims extremely expensive to litigate. The court of appeals' rule will further complicate these actions "with attempts to trace the effects of the overcharge on the purchaser's prices, sales, costs, and profits, and of showing that these variables would have behaved differently without the overcharge." *Illinois Brick*, 431 U.S. at 725.

It would be surpassingly difficult for a jury to determine how much an input overcharge increased downstream prices. And even if there were evidence that the entire overcharge was passed on, the jury would have to determine whether a direct purchaser suffered harm from decreased sales. Determining price elasticity and weighing the other factors involved in calculating the net effect on profits caused by supra-

competitive pricing of a single input would almost certainly be impossible.

The additional litigation costs associated with such issues—and the very significant risks that a jury will be unable to follow the parties' arguments—will further increase the pressure on defendants to settle even non-meritorious claims.

C. *Illinois Brick* Precludes All Claims Based On Pass-Through Damages, Regardless Of the Particular Distribution Model.

1. Even if it might be thought to be desirable, from a policy standpoint, to adopt the manufacturer-versus-distributor distinction suggested below—and as we have shown, it clearly is not—that distinction cannot be reconciled with *Illinois Brick*. No part of the *Illinois Brick* rule depends on the particular positions that the plaintiff and the defendant occupy in the marketplace.

Rather, *Illinois Brick* addressed—as a categorical matter—what rule "is to be adopted regarding pass-on in antitrust damages actions." 431 U.S. at 728. It held that pass-through theories of liability are never permissible because of the difficulties they create for courts and the possibility of multiple liability.

That focus on economic substance, rather than labels, makes good sense: Regardless whether the defendant in an antitrust case is deemed a "manufacturer," a "distributor," or something else, a theory of the case that relies on pass-through damages presents the same practical and policy concerns that *Illinois Brick* sought to avoid.

To the extent that respondents argue that digital distribution models like Apple's App Store present less complicated pass-through analyses than other market

models, that argument is precluded by this Court's precedents. The Court considered and rejected that same contention in *Kansas* v. *UtiliCorp United, Inc.*, 497 U.S. 199 (1990).

There, two States acting as *parens patriae* brought an antitrust lawsuit on behalf of consumers against a gas pipeline company and several gas production companies, alleging that they fixed prices. *Id.* at 204-05. The lower courts held that this consumer lawsuit was barred by *Illinois Brick* because consumers did not purchase gas directly from the gas suppliers, and that the proper plaintiffs were the gas utilities that purchased directly from the suppliers. *Id.* at 205.

Before this Court, the States argued that the Court should make an exception to the *Illinois Brick* rule for "cases involving regulated public utilities that pass on 100 percent of their costs to their customers," arguing that in such cases, *Illinois Brick*'s concerns about the difficulty of apportioning passed-through costs and the potential for multiple recovery were obviated. *Id.* at 208. But this Court declined to do so. It held that although "[t]he rationales underlying *Hanover Shoe* and *Illinois Brick* will not apply with equal force in all cases," "ample justification exists for our stated decision not to '"carve out exceptions to the direct purchaser rule for particular types of markets,'" because "[t]he possibility of allowing an exception, even in rather meritorious circumstances, would undermine the rule." *Id.* at 216 (brackets omitted) (quoting *Illinois Brick*, 431 U.S. at 744).

Indeed, the Court explained, the very process of "classifying various market situations according to the amount of pass-on likely to be involved and its susceptibility of proof in a judicial forum would entail the very problems that the [direct purchaser] rule was

meant to avoid." *Ibid.* (quoting *Illinois Brick*, 431 U.S. at 744-45).

UtiliCorp's analysis applies with equal force here. Whatever the particular features of Apple's App Store, or of digital distribution models in general, they do not justify departing from *Illinois Brick*'s general rule against pass-through damages. Creating an exception to that doctrine for digital intermediaries like Apple could open the floodgates to a host of similar exceptions, "undermin[ing]" the rule (*ibid.*) and bogging courts down in the very complicated pass-through determinations that *Illinois Brick* precludes.

2. *Stare decisis* also weighs heavily against recognizing any exceptions to the *Illinois Brick* rule. The Court has often observed that *stare decisis* "is 'a foundation stone of the rule of law.'" *Kimble* v. *Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015) (quoting *Michigan* v. *Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 (2014)). That is so for three reasons.

First, adhering to prior precedents is essential to "maintaining public faith in the judiciary as a source of impersonal and reasoned judgments." *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970). By committing generally to follow prior decisions rather than routinely calling them into question, courts foster public confidence in the integrity and impartiality of the judicial process.

Second, *stare decisis* "further[s] fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case." *Ibid.* It would be inefficient, to say the least, if litigants used every new case implicating an issue as an opportunity to argue for revisiting old rulings. *Stare decisis* forecloses

such lines of argument, allowing courts and litigants to focus their attention on other subjects.

Finally, *stare decisis* aids the law in "furnish[ing] a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise." *Ibid.* The purpose of a system of laws is to enable individuals and businesses to predict what the law requires of them, so that they can plan their affairs effectively.

A key component of the predictability of the law is the assurance provided by *stare decisis* that settled precedents can be relied upon not to change. The Court is therefore especially reluctant to overturn existing precedents when "individuals may have arranged their affairs in reliance on the expected stability of decision"—as is often true in "area[s] of commercial law." *Monroe* v. *Pape*, 365 U.S. 167, 221–22 (1961) (Frankfurter, J., dissenting in part); see also, *e.g.*, *Payne* v. *Tennessee*, 501 U.S. 808, 828 (1991) ("Considerations in favor of stare decisis are at their acme in cases involving property and contract rights, where reliance interests are involved.").

These rationales apply strongly with respect to the direct purchaser rule of *Hanover Shoe* and *Illinois Brick*. That rule is one of the most venerable doctrines in antitrust law. This Court has affirmed it on multiple occasions. See *Illinois Brick*, 431 U.S. at 736 (declining to "overrule *Hanover Shoe*"); *UtiliCorp*, 497 U.S. at 217 ("Having stated the rule in *Hanover Shoe*, and adhered to it in *Illinois Brick*, we stand by our interpretation of [Clayton Act] § 4.").

Numerous businesses have ordered their affairs in light of the rule, by operating on the understanding that they would not be exposed to liability for double

(actually sextuple) antitrust damages as a result of potential pass-through liability, regardless how they organized their supply and distribution chains. Departing from *Hanover Shoe* and *Illinois Brick* here would thus disrupt the stability of this Court's precedents—and the settled expectations of businesses across the country.

Creating an exception to the direct purchaser rule would also lead to considerable "relitigation" (*Moragne*, 398 U.S. at 403) of the doctrine in future cases, as increasing numbers of antitrust plaintiffs would argue that some particular characteristic of their markets, too, justify an exemption from *Illinois Brick*'s formerly bright line rule. The new information economy, as we have shown, will create even more opportunities for courts to craft such exemptions, because it is ever more common for users of digital goods and services to purchase them through intermediaries. The resulting flood of litigation, and the associated increase in antitrust exposure for digital companies, will redound to the detriment of consumers.

To be sure, this Court has overturned prior antitrust decisions—but it has done so only when those decisions have been shown to be ill-reasoned or otherwise "flawed." See *Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 900, 904 (2007) (overturning *Dr. Miles Med. Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373 (1911), which had been "called into serious question" and repudiated by the government); see also, *e.g.*, *State Oil Co.* v. *Khan*, 522 U.S. 3, 22 (1997) (overturning *Albrecht* v. *Herald Co.*, 390 U.S. 145 (1968), because "we find its conceptual foundations gravely weakened").

Here, by contrast, the reasoning underlying *Illinois Brick* is as strong today as it was when the case was decided.

This Court need not and should not invite these harmful consequences by holding that a digital "distributor" like Apple is somehow outside the reach of *Illinois Brick*. The Court should instead reverse the decision below and reaffirm that *Illinois Brick* prohibits claims of all kinds resting on a pass-through damages theory.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 17-204

IN THE

Supreme Court of the United States

IN RE APPLE IPHONE ANTITRUST LITIGATION,

APPLE INC.,

Petitioner,

v.

ROBERT PEPPER, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community. The Chamber routinely files amicus briefs in cases, such as this one, that involve novel theories of liability that threaten to expand class action litigation.

In this brief, the Chamber seeks to emphasize that the Ninth Circuit's ruling threatens to severely distort the e-commerce marketplace, where consumers spend trillions of dollars every year. The opinion below is an erroneous and deeply problematic interpretation of this Court's decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). Left in place, the Ninth Circuit's decision will result in a cascade of new antitrust cases, even in circumstances where no anticompetitive conduct has occurred. The opinion below will significantly increase the cost and complexity of antitrust

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[1] Pursuant to this Court's Rule 37.6, counsel for amicus curiae states that no counsel for a party authored this brief in whole or in part, and no one other than amicus, its members, and its counsel made a monetary contribution to fund the preparation or submission of this brief. Both parties have consented to the filing of this brief.

litigation. This Court should reverse the judgment of the Ninth Circuit.

INTRODUCTION AND SUMMARY OF ARGUMENT

For more than 40 years, this Court has held that the only entity that may bring a suit for treble damages under Section 4 of the Clayton Act is the direct purchaser of a monopolized good or service. Although the direct purchaser may "pass on" some or all of the monopolistic overcharge to downstream parties in the supply chain, the direct purchaser is the *only* party who may recover under Section 4, and it may recover the *full amount* of the overcharge.

The reasons for this "direct purchaser" rule are three-fold. First, it "eliminate[s] the complications of apportioning overcharges between direct and indirect purchasers," *Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199, 208 (1990), a task which "would often require additional long and complicated proceedings involving massive evidence and complicated theories," *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 493 (1968). Second, and relatedly, the rule "eliminate[s] multiple recoveries" that might occur if both direct and indirect purchasers could sue for the same anticompetitive overcharge. *UtiliCorp*, 497 U.S. at 212. Third, the Court has determined that "the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers rather than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it." *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 735 (1977).

The Ninth Circuit's decision below violates this direct purchaser rule. Respondents allege that Apple monopolizes app-delivery services, but it is the *app developers* who purchase those services directly from Apple in order to sell their apps to respondents, who in turn are the ultimate consumers. App developers bear the full alleged overcharge, which they may then build into the cost of their apps and thereby pass on to end-consumers like respondents. This ability to pass on alleged overcharges is the hallmark of a direct purchaser. Whether app developers choose to pass on some or all of the alleged overcharge is at the discretion of the developers themselves, and nobody else. Respondents, by contrast, do not purchase anything from Apple, and could not pass on the costs of any overcharge even if they wanted to do so. At the same time, the implications of this decision are startling: The Ninth Circuit openly acknowledged the possibility that "Apple [*also*] sells distribution services to app developers within the meaning of *Illinois Brick*" and, "[i]f it d[oes], this would necessarily imply that the developers, as direct purchasers of those services, could bring an antitrust suit against Apple," as well. Pet. App. 20a. This is precisely the type of result that the Court in *Illinois Brick* sought to avoid.

This case also points to a growing problem with antitrust litigation in federal courts. Although the Court has rejected indirect purchaser claims under *federal* law, it has permitted such actions under *state* law. Since the enactment of the Class Action Fairness Act of 2005 ("CAFA"), however, an increasing number of indirect purchaser class actions are finding their way back onto the federal docket. And federal district courts have certified these classes in cases that raise

serious questions as to whether they are properly enforcing the rigorous requirements of Rule 23, including commonality, predominance, and superiority.

For all the reasons articulated in *Hanover Shoe*, *Illinois Brick*, and *UtiliCorp*, these cases present inherent obstacles to certification under Rule 23. The difficulties of tracing the pass-on of alleged monopoly overcharges are well-documented by this Court's caselaw. But even if there were a case in which pass-on injury could be calculated with accuracy and consistency through a *single* supply chain, it would be all but impossible to replicate the feat across the *multiple* supply chains that are implicated in an indirect purchaser class action. In the context of indirect purchaser class actions, the "nearly insuperable" difficulties presented by such a task justify with special force the Court's refusal "to litigate a series of exceptions" to *Illinois Brick*. *UtiliCorp*, 497 U.S. at 217.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION VIOLATES *ILLINOIS BRICK*

A. Under *Illinois Brick*, Only Direct Purchasers Have Standing To Sue For Treble Damages

Illinois Brick determines which party is the proper plaintiff to allege an antitrust injury. The answer, repeatedly and unequivocally confirmed by this Court, is that only the "direct purchaser[ ]" from the defendant is entitled to sue, for "the full recovery for the overcharge." *Illinois Brick*, 431 U.S. at 735. There must be only "one plaintiff," and never more than one at any other level of the distribution system. *Id.* at 730. This

rule therefore "denies recovery to" indirect purchasers, even though those purchasers "may have been actually injured by antitrust violations." *Id.* at 746.

This "direct purchaser" rule has deep roots in this Court's jurisprudence. It traces its origins to *Hanover Shoe*, a case in which this Court held that a *defendant* may not avoid antitrust liability by contending that the plaintiff passed on the entire cost of the allegedly monopolistic overcharge to the plaintiff's downstream customers. 392 U.S. at 492–93. The Court explained that, because a wide range of considerations normally influence a company's pricing decisions, any attempt to establish the amount of an overcharge that was shifted to indirect purchasers "would normally prove insurmountable." *Id.* at 493.

Then in *Illinois Brick*, the Court recognized the necessary corollary of *Hanover Shoe*'s prohibition of the pass-on defense: An indirect purchaser, who suffered harm when the cost of monopolistic activity was passed on to it by another party, is not permitted to sue. *Illinois Brick*, 431 U.S. at 728. The Court held that "whatever rule is to be adopted regarding pass-on in antitrust damages actions, it must apply equally to plaintiffs and defendants." *Ibid.* Were it otherwise, suits by indirect purchasers "would create a serious risk of multiple liability for defendants," because direct and indirect purchasers would be able to sue the defendant for the same conduct. *Id.* at 730. And *Illinois Brick* declined to adopt a rule that would apportion recovery among direct and indirect purchasers because doing so would impose enormous burdens on the courts.

In *UtiliCorp*, the Court rejected a proposal to create an exception to *Illinois Brick* for situations in which it is arguably easier to trace the pass-on of an alleged overcharge to indirect purchasers. 497 U.S. at 208. Declining to sanction such a carve-out, the Court explained that *any* suit by an indirect purchaser requires a determination of whether, absent the alleged illegal conduct, the direct purchaser could have raised its prices. This, the Court explained, was the very inquiry that *Hanover Shoe* had held to be "nearly insuperable." *Id.* at 209 (quoting *Hanover Shoe*, 392 U.S. at 493). As a result, the direct purchaser rule established in *Illinois Brick* is categorical: "[E]ven assuming that any economic assumption underlying the *Illinois Brick* rule might be disproved in a specific case, we think it an unwarranted and counterproductive exercise to litigate a series of exceptions." *Id.* at 217.

B. The Decision Below Creates Precisely The Type Of "Exception" To The Direct Purchaser Rule That This Court Has Rejected

The Ninth Circuit's decision establishes just such an exception to the direct purchaser rule. And although the Ninth Circuit claimed (Pet. App. 21a) that its decision was "compelled by" this Court's decisions in *Hanover Shoe*, *Illinois Brick*, and *UtiliCorp*, it in fact openly invites the precise problems that those cases sought to avoid.

1. In a conventional distribution chain involving an allegedly monopolistic manufacturer, an intermediate manufacturer, one or more distributors, and ultimate consumers, the direct purchaser is "the immediate buyer[ ] from the alleged antitrust violator[ ]."

UtiliCorp, 497 U.S. at 207. In a case like this one, where the defendant offers a platform service to aid app developers in selling their product to consumers, this Court's precedent teaches that the direct purchaser who may sue is the party who bore the "*full amount* of the overcharge" attributable to the defendant's alleged monopolization. *Illinois Brick*, 431 U.S. at 730 (emphasis added). That is, determining that party's injury *does not* require an "attempt to trace the effect of the overcharge through each step in the distribution chain from the direct purchaser to the ultimate consumer." *Id.* at 741.

The Ninth Circuit erred because it flipped the *Illinois Brick* analysis on its head: It mistakenly started with the consumer, and then looked for which party is a proper *defendant*. The Ninth Circuit stated that "[t]he consumer [in *Hanover Shoe*, *Illinois Brick*, and *UtiliCorp*] did not have standing to sue the manufacturer or the producer, but did have standing to sue the intermediary, whether the intermediate manufacturer or the distributor." Pet. App. 17a. Thus, the Ninth Circuit explained, "[t]he distributor who 'supplies the product directly to' plaintiffs, rather than the producer of the product, is *the appropriate defendant* in an antitrust suit." Pet. App. 19a (quotation marks omitted) (emphasis added).[2]

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[2] This is not the first time the Ninth Circuit has departed from this Court's precedent. In *Royal Printing Co. v. Kimberly Clark Corp.*, 621 F.2d 323, 327 (9th Cir. 1980), for example, the Ninth Circuit carved out a similar exception to *Illinois Brick*, allowing indirect purchasers to sue when they purchased allegedly price-fixed products from a direct purchaser who did not conspire but was owned or controlled by an alleged conspirator. Commenta-

In other words, according to the Ninth Circuit, an ultimate consumer who is injured by an antitrust violation always has standing under the Clayton Act to sue *someone*. But that is wrong—the intermediaries in this Court's prior cases did not even allegedly violate the antitrust laws, so there was no claim at all to assert against them. *Illinois Brick* is not, as the Ninth Circuit believed, a search for "the appropriate defendant." Rather, *Illinois Brick* starts with the alleged monopolist—the defendant—and then searches for the appropriate *plaintiff*—the one party that can show it bore the entire amount of the defendant's allegedly monopolistic overcharge, without having the overcharge passed on to it by another party. *See UtiliCorp*, 497 U.S. at 204 (in applying *Illinois Brick*, the Court "must decide *who may sue* under" the antitrust laws) (emphasis added).

The view that consumers injured by an antitrust violation should always be able to bring suit was adopted by Justice Brennan in *dissent* in *Illinois Brick*. *See* 431 U.S. at 749 (Brennan, J., dissenting) (the antitrust laws "[were] clearly intended to operate to protect individual consumers who purchase through middlemen"). The Court rejected that approach in favor of the direct purchaser rule, even

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tors have recognized that "the *Royal Printing* conspirator ownership exception should be recognized as abrogated by *Utilicorp*," but rather than overrule that decision, courts in the Ninth Circuit have "broadly expand[ed] the ownership or control exception." Lee F. Berger & Sophie J. Sung, *The Northern District of California Opens Its Doors to the World's Civil Antitrust Disputes*, 24 Competition: J. Anti. & Unfair Comp. L. Sec. St. B. Cal. 145, 151–52 & n.40 (2015).

though it was fully aware that the rule "denies recovery to those indirect purchasers who may have been actually injured by antitrust violations." *Id.* at 746 (majority op.); *see also UtiliCorp*, 497 U.S. at 211–12 ("Our decisions in *Hanover Shoe* and *Illinois Brick* often deny relief to consumers who have paid inflated prices because of their status as indirect purchasers."). The Court concluded that those costs are outweighed by the benefits of the direct purchaser rule, which prevents double recovery, significantly reduces the complexity of antitrust litigation, and creates the right incentives for appropriate enforcement of the antitrust laws.

Properly applied, *Illinois Brick* explains why respondents here are not entitled to sue. Apple is the alleged monopolist, so the question before the Court is who would be the proper plaintiff—the app developers or respondents, the ultimate consumers. Only one can be the direct purchaser, not both, because they have different relationships to the defendant. *See Illinois Brick*, 431 U.S. at 735; Brief for the United States as Amicus Curiae Supporting Respondents, *Kansas v. UtiliCorp. United, Inc.*, 497 U.S. 199 (1990) (No. 88-2109) ("a direct purchaser that suffers injury (and only the direct purchaser) is entitled to recover"). Here, the app developer bears the full burden of the alleged overcharge. By virtue of this position, the developer also has the opportunity to pass on some or all of that alleged overcharge to an app purchaser: the developer sets the price for an app, taking into account what the developer pays to Apple (in the form of a commission) for Apple's delivery service, and then charges the consumer. That is a classic example of passing on an overcharge.

The consumers, by contrast, *cannot* be the direct purchasers, because it would make no sense to say that they bear the full amount of Apple's allegedly monopolistic overcharge and then pass on those costs to the app developers. The app developers create the product (the apps) and set the price for it—the respondent consumers are in a *downstream* relationship from the app developers, and they do not pass on costs to anyone. Indeed, the consumers are the last link in the transaction, which is why *Illinois Brick* recognized that the direct purchaser rule will very often bar "the ultimate consumer" from bringing suit. 431 U.S. at 741.

2. As explained above, the direct purchaser rule is grounded in the desire to avoid double liability and efficiently manage antitrust litigation. In recent years, some have questioned whether such a strict rule is necessary to accomplish these aims. These critics have suggested that careful case management and increasingly sophisticated econometric tools can allow both direct and indirect purchasers to recover their actual damages without presenting serious traceability problems and the risk of double liability that they entail. *See, e.g.*, Deborah A. Garza, et al., *Antitrust Modernization Commission Report and Recommendations* 265–83 (Apr. 2007), https://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

Whatever the merits of these arguments, it is indisputable that *actually* imposing double liability on antitrust defendants is impermissible. Yet the Ninth Circuit's decision all but admits that its rule will produce this result. The Ninth Circuit acknowledged that if "Apple sells distribution services to app develop-

ers[,] . . . this would necessarily imply that the developers, as direct purchasers of those services, could bring an antitrust suit against Apple." Pet. App. 20a. Nevertheless, the Ninth Circuit insisted that this "makes no difference to our analysis in the case now before us." *Id.* In other words, the Ninth Circuit expressly condoned multiple liability: It gave respondents the green light to sue even though the app developers would also be entitled to sue for the same alleged overcharge. Such an approach directly contravenes this Court's precedent. *See UtiliCorp*, 497 U.S. at 212 ("The *Illinois Brick* rule . . . serves to eliminate multiple recoveries.").

The consequences of allowing duplicative liability against every company that provides a platform to connect sellers with buyers cannot be understated. Even setting fundamental fairness to the side, multiple liability would upset the carefully crafted approach to antitrust enforcement that was devised by Congress. *See* Br. of the United States in *UtiliCorp*, *supra* ("the deterrence objective should be considered in light of incentives to sue and limiting the complexity of litigation"). The Ninth Circuit opened the door to *double recovery* of *treble damages* without considering one of the imperatives of the antitrust system: to "ensure that the overcharges will be paid only once to avoid over-deterrence." Andrew I. Gavil, *Thinking Outside the* Illinois Brick *Box: A Proposal for Reform*, 76 Antitrust L.J. 167, 194 (2009).

C. The Ninth Circuit's Decision Will Have Especially Pernicious Effects On E-Commerce

The decision below will adversely affect the dynamic and evolving e-commerce marketplace. The rapid growth of this sector has spurred innovation as companies develop new models to provide a better user experience for manufacturers, retailers, and consumers. Such innovation will be hindered by the Ninth Circuit's significant expansion of the costs and risks of antitrust litigation.

Electronic retail sales are a substantial part of the global economy. They have grown at a double-digit rate for years, and are estimated to have reached $2.3 trillion—a full 10% of all retail sales—in 2017. *Worldwide Retail Ecommerce Sales Will Reach $1.915 Trillion This Year*, eMarketer (Aug. 22, 2016).[3] Smartphone apps, in particular, are an enormously significant part of e-commerce. Apple, Google, Microsoft, and other companies have all developed their own platforms to enable users to acquire apps. These platforms differ in some respects, but fundamentally they all operate by helping consumers locate and obtain app content. In some cases (but not all), the companies charge fees to the app developers for that service. And that service has enabled the content-creators who develop apps to enjoy unparalleled success: Just on the Google Play Store in 2016 alone, users of 900 million devices in 190 countries downloaded 82 billion apps. Vineet Buch, *I/O 2017: Everything new*

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[3] https://tinyurl.com/y7n6c4tu.

in the Google Play Console, Android Developers Blog (May 17, 2017).[4]

Accompanying all of this growth is rapid innovation in distribution and marketing as companies experiment with how their platforms can best balance consumer choice, quality control, transparency and security, and price. Models similar to that used by Apple—online platforms that introduce sellers to buyers who would like to obtain concert tickets, apps, or other goods and services—may be favored by consumers because they may make transactions easier and more efficient. And those models also may benefit app developers and event promoters, who may spend less time locating customers and instead focus on what they do best: creating and improving app content and putting on terrific events.

The growth and innovation in this industry is directly threatened by the decision below. If the Ninth Circuit's reasoning stands, technology companies will face the threat of multiple treble-damages liability in actions brought by remote purchasers. The result of the Ninth Circuit's myopic focus on which party interacts most with the consumer will be to force companies to alter their business models in order to mitigate litigation risk, rather than focusing on how to achieve efficiencies or meet consumer preferences. The increased risk and cost of litigation will chill innovation, discourage commerce, and hurt developers, retailers, and consumers alike.

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[4] https://tinyurl.com/mof3cns.

II. This Case Illustrates A Growing Problem In Antitrust Class-Action Litigation

Although this Court has held that Section 4 of the Clayton Act does not permit indirect purchasers to sue for treble damages, it has also clarified that "[t]he congressional purposes on which *Illinois Brick* was based provide no support for a finding that state indirect purchaser statutes are pre-empted by federal law." *California v. ARC America Corp.*, 490 U.S. 93, 105–06 (1989). In response, more than 25 states have enacted statutes allowing indirect purchasers to sue under their own antitrust laws. *See* William B. Rubinstein, *Newberg on Class Actions* § 20:12 (5th ed. June 2018) (explaining that 26 states plus the District of Columbia allow indirect purchasers to sue on their own behalf, and six states allow their attorneys general to sue in *parens patriae* on behalf of resident indirect purchasers).

At first, these state-law actions largely remained in state court. But in 2005, Congress enacted the Class Action Fairness Act ("CAFA"), which lowered the bar to federal court by allowing a plaintiff who asserts only state-law claims to invoke federal diversity jurisdiction so long as (1) the claims are asserted on a class basis; (2) the amount in controversy exceeds $5 million; and (3) minimal diversity exists. 28 U.S.C. § 1332(d)(2). The potential impact on indirect purchaser claims was quickly noted. *See* Steven M. Puiszis, *Developing Trends With the Class Action Fairness Act of 2005*, 40 J. Marshall L. Rev. 115, 193 (2006) ("CAFA will also likely shift to federal court many indirect purchaser class actions filed under state antitrust laws."). And it did not take long for these predictions to materialize. As one commentator reported

just five years later, "[a]nother trend of increasing significance is the inclusion of state-law indirect purchaser claims in federal antitrust class actions," with "[p]laintiffs in 31 cases—over 25 percent of all cases filed in the past three years—assert[ing] indirect purchaser claims under state law." Donald W. Hawthorne, *Recent Trends in Federal Antitrust Class Action Cases*, 24 Antitrust 58, 59 (Summer 2010). This trend has not abated. On the contrary, today "most indirect purchaser suits are now heard in federal court." Alexei Alexandrox, *Pass-Through Rates in the Real World: The Effect of Price Points and Menu Costs*, 79 Antitrust L.J. 349, 351 n.7 (2013).

Of course, there is nothing intrinsically problematic about this trend. And to the extent indirect purchaser claims can be asserted *somewhere*, as *ARC America* held they may, there are strong reasons for preferring that those claims be brought in a federal forum. *See* Garza, *Antitrust Modernization Commission* at 272 (noting the benefits of removing indirect purchaser actions from different state courts so they may be consolidated before a multidistrict litigation panel).

But the very same concerns about speculative damages and traceability that led this Court to bar indirect purchaser claims under Section 4 present serious obstacles to certifying these state-law claims under Rule 23. After all, "Rule 23 does not set forth a mere pleading standard." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Instead, "[a] party seeking class certification must affirmatively demonstrate his compliance with the Rule" by establishing that "there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Ibid.* And a

class "may only be certified if the trial court is satisfied, after a *rigorous analysis*, that the prerequisites of Rule 23[ ] have been satisfied." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982) (emphasis added).

It is exceedingly difficult for a putative class of indirect purchasers to meet this exacting standard. "The principal basis for the decision in *Hanover Shoe* was the Court's perception of the uncertainties and difficulties in analyzing price and out-put decisions 'in the real economic world rather than an economist's hypothetical model,' and of the costs to the judicial system and the efficient enforcement of the antitrust laws of attempting to reconstruct those decisions in the courtroom." *Illinois Brick*, 431 U.S. at 731–32 (quoting *Hanover Shoe*, 392 U.S. at 493). And "the evidentiary complexities and uncertainties involved in the defensive use of pass-on against a direct purchaser are multiplied in the offensive use of pass-on by a plaintiff several steps removed from the defendant in the chain of distribution" because "[t]he demonstration of how much of the overcharge was passed on by the first purchaser must be repeated at each point at which the price-fixed goods changed hands before they reached the plaintiff." *Id.* at 732–33.

Nor have advances in econometric sophistication offered a cure for the fundamental problems of commonality and predominance that indirect purchaser *class actions* present vis-à-vis calculating pass-on damages. While it is evident that a "damage scenario becomes less persuasive when it must account for the behavior of more actors," it is equally true that the manufacturers, distributors, and consumers that are all relevant to determining pass-on injury "are not automata that respond uniformly to a changed condition

like a price increase." William H. Page, *The Limits of State Indirect Purchaser Suits: Class Certification in the Shadow of Illinois Brick*, 67 Antitrust L.J. 1, 11 (1999).

Thus, as one court has explained, indirect purchasers "have a 'double burden' at trial; they must first prove common impact on direct purchasers who bought [a monopolized good] from the Defendants, and then show that impact was passed through to the indirect purchaser class." *In re Fla. Cement & Concrete Antitrust Litig.*, 278 F.R.D. 674, 682 (S.D. Fla. 2012) (denying class certification); *see also* Rubinstein, *Newberg on Class Actions* § 20:53 (discussing the "palpable predominance concern in indirect purchaser suits concern[ing] the dual level of purchases"). And even if commonality and predominance can be shown, producing an acceptable damages model presents another high hurdle for plaintiffs. *See In re Graphics Processing Units Antitrust Litig.*, 253 F.R.D. 478, 504 (N.D. Cal. 2008) ("Because of the large number of manufacturers, resellers, and products at issue here, [plaintiff's expert] was forced to use different variables in each of her reseller-specific regressions.").

Yet courts *are* certifying indirect purchaser classes—notwithstanding the very problems of traceability and speculative damages that this Court has cautioned against. For example, in *In re Polyurethane Foam Antitrust Litigation*, 314 F.R.D. 226 (N.D. Ohio 2014), the court certified a class of "individual consumers and 'authorized managing agents' for hotels and other entities operating in various states . . . who purchased products containing flexible polyurethane foam . . . not for resale." *Id.* at 232. This foam was used in widely divergent products purchased by class

members, including "(1) carpet underlay; (2) 'bedding (*i.e.*, mattresses, pillows, and toppers)' and; (3) 'upholstered furniture products, including upholstered sofas and chairs.'" *Id.* at 234. And the plaintiffs' expert acknowledged that "[t]here are 'links' in the distribution chain separating indirect purchasers from direct purchasers." *Id.* at 280. Nevertheless, the court explained that the expert need only "use [ ] simple arithmetic to calculate passthrough,'" *id.*, and proceeded to certify the class.

Similarly, in *In re Flonase Antitrust Litigation*, 284 F.R.D. 207 (E.D. Pa. 2012), the court certified three indirect purchaser classes covering different time periods and claims. *See, e.g.*, *id.* at 216 (defining one class to include "[a]ll persons or entities . . . who from August 2004 through March 2006 purchased, paid for, and/or reimbursed for branded Flonase," and "*also* purchased, paid for, and/or reimbursed [a generic FP] from March 2006 to March 2009 in the same designated state in which the Flonase purchase was made"). As in the foam litigation, the court relied heavily upon an expert who opined that through a "yardstick methodology . . . he can demonstrate that across all types of end-payors and all distribution channels, injury and damages occurred in this case as a result of GSK's delaying generic entry." *Id.* at 220. The court accepted this approach despite its obvious—and acknowledged—flaws: "I am satisfied that although the magnitude of overcharges will vary across class members, Indirect Purchasers have set forth a just and reasonable estimate of the class-wide overcharge damages." *Id.* at 223.

And here, respondents seek to represent a class that includes "[a]ll persons . . . who purchased an iPhone anywhere in the United States at any time, and who then also purchased applications from Apple from December 29, 2007 through the present." J.A. 56–57. But app developers adopt a wide variety of pricing practices. Some app developers do not charge users at all, preferring to fund their operations through advertising; the alleged monopolistic practice here might *encourage* such a model—which causes respondents no cognizable injury—because the App Store does not take a commission in these circumstances. Other app developers may adopt a mixed pricing strategy, using a combination of up-front charges to purchase their apps in the first instance, and additional charges later if a consumer makes in-app purchases to access premium features or content. Even among this latter class of app developers, some have chosen to charge the same amount across app platforms, while others have expressly charged more for apps purchased through the Apple Store—a clear example of pass-on. *See* Ed Shelley, *The State of Subscriptions on the App Store* (ChartMogul Feb. 5, 2018) ("Spotify premium costs $9.99 monthly if you subscribe on the web, but $12.99 monthly if you purchase through the App Store. This is a prime example of the business passing the Apple Tax down to consumers.").[5]

The fundamental premise underlying *Illinois Brick* is that complicated inquiries into pass-on injuries need not—and ought not—be undertaken on a case-by-case basis. Rather, "even assuming that any economic assumption underlying the *Illinois Brick*

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[5] https://tinyurl.com/yb4casa8.

rule might be disproved in a specific case, we think it an unwarranted and counterproductive exercise to litigate a series of exceptions." *UtiliCorp*, 497 U.S. at 217. These concerns apply with special force to indirect purchaser class actions.

CONCLUSION

For the reasons stated above, the judgment of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

IN RE APPLE IPHONE ANTITRUST LITIGATION,

APPLE INC.,

Petitioner,

v.

ROBERT PEPPER, ET AL.

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Computer & Communications Industry Association (CCIA) is an international nonprofit association representing a broad cross-section of computer, communications, and Internet industry firms that collectively employ nearly a million workers and generate annual revenues in excess of $540 billion. CCIA believes that open and competitive markets together with original, independent, and free speech foster innovation. It regularly files *amicus* briefs in this and other courts on issues including competition law, intellectual property, privacy, and cybersecurity. *See, e.g., TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514 (2017) (patents); *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014) (copyright); *Ill. Tool Works, Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006) (antitrust). Most recently, CCIA submitted an *amicus* brief in *Ohio v. American Express Co.*, 138 S. Ct. 2274 (2018), which—like this case—involved the application of antitrust laws to multi-sided platform services. Many CCIA members offer digital platform services, providing numerous procompetitive benefits. CCIA members operate in digital markets

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amicus* or their counsel made such a monetary contribution. Counsel for all parties consented to the filing of this brief.

with "extremely low barriers to entry" and that are therefore "characterized by vibrant competition."[2]

CCIA's principal concern in this case is that the Ninth Circuit's decision, if adopted by this Court, could have significant adverse effects on competition by deterring the development of innovative platform business services. The Ninth Circuit's formalistic focus on "distributors" and "manufacturers" for purposes of determining antitrust standing ignores the recent technological and business development of multi-sided digital platform services and exposes these innovative services to claims for treble damages by plaintiffs relying on "pass-on" theories of harm. That result is contrary to this Court's precedents recognizing that standing to recover treble damages under the federal antitrust laws is limited to direct purchasers and does not support claims by others alleging damages that are passed on. If businesses offering digital platform services risk being subjected to such massive, duplicative treble-damages claims simply for connecting buyers and sellers, they likely will be less inclined to offer and extend these services. Because the Ninth Circuit's ruling would chill that procompetitive activity, counter to the purposes of the Clayton Act and this Court's precedents, CCIA urges this Court to reverse the decision below and reaffirm that plaintiffs lack standing to seek damages based on a "passed-on" theory of injury.

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[2] Computer & Communications Industry Association, Antitrust, http://www.ccianet.org/issues/antitrust/page/3.

INTRODUCTION AND SUMMARY OF ARGUMENT

In recent decades, the economy has been increasingly driven by companies offering digital, multi-sided platform services, ranging from e-commerce sites like Etsy to dining reservation sites like OpenTable to home buying sites like Redfin.[3] Rather than converting raw materials into products as do traditional manufacturers, businesses offering platform services—also known as "matchmakers"—harness technologies to serve multiple, interrelated sets of customers and offer valuable products and services to sellers and consumers alike.

Platform services have boosted the economy, and their benefits have flowed most directly to consumers and small sellers. Among other benefits, platform services allow consumers to make instant, side-by-side product comparisons; facilitate connections between buyers and sellers by lowering discovery and transaction costs; increase consumer confidence with tools like user ratings; enhance the quality of seller content through effective curation; and lower start-up costs for small sellers.

The decision below puts these platform services—and the benefits they provide—under threat. The

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[3] *See* David S. Evans & Richard Schmalensee, *Matchmakers: The New Economics of Multisided Platforms* 1, 8 (2016). Platforms can be referred to as "two-sided" where they connect two distinct groups (often buyers and sellers). We use the term "multi-sided" to refer to platforms that may connect more than two distinct sets of consumers. For example, meal-delivery services, like DoorDash, connect at least three separate groups: (1) consumers, (2) restaurants, and (3) delivery personnel.

Ninth Circuit's rule would allow an action for treble damages against any company with which the plaintiff has transacted, regardless of whether the claims arise from alleged pass-on damages, so long as that defendant can be labeled a "distributor." *See* Pet. App. 17a.

The Ninth Circuit's decision rests on at least three errors. *First*, the court of appeals failed to recognize that Apple's role, like that of other multi-sided platforms, in connecting app developers with app users is fundamentally different from that of "distributors" operating in traditional vertical supply models like those at issue in *Hanover Shoe*, *Illinois Brick*, and *Utilicorp*. The resulting decision contradicts this Court's admonition that antitrust law be based on "actual market realities" rather than "formalistic distinctions." *Am. Express*, 138 S. Ct. at 2285 (quoting *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 466–67 (1992)).

Second, Respondents do not have antitrust standing under Section 4 of the Clayton Act because they are "indirect purchasers" of app-*distribution* services—the service allegedly monopolized, of which the app developers and not Respondents are the direct purchasers. And although Respondents allegedly paid "some portion of the monopoly overcharge," they did so "only because the previous purchaser [the app *developer*] was unable to avoid that overcharge." *Campos v. Ticketmaster Corp.*, 140 F.3d 1166, 1170 (8th Cir. 1998).

Third, by purporting to evaluate solely whether Apple is a "distributor," the court of appeals asked the

wrong question. The dispositive question to determine whether *Illinois Brick* bars a suit due to lack of antitrust standing is whether the plaintiff relies on a "pass-on" theory of injury. If so, the plaintiff lacks standing because such an expansive interpretation would expose a defendant to duplicative treble-damages recoveries far in excess of what Section 4 of the Clayton Act permits. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720, 730 (1977) (deeming unacceptable the "serious risk of multiple liability for defendants"). The holding of *Illinois Brick* does not turn on whether the arbitrary label of "distributor" may be applied to the defendant.

The implications of adopting the Ninth Circuit's erroneous legal reasoning are especially grave for businesses offering platform services. Because multi-sided platforms must, by definition, interface with multiple interrelated groups of users, they are disproportionately affected by a rule that extends antitrust standing to multiple sets of consumers on different sides of their platforms for the same ultimate damages claim.

Platform-based businesses will be harmed by the Ninth Circuit's failure to adhere to *Illinois Brick*, but ultimately consumers and small sellers will pay the price. Faced with the potential for six-fold or greater damages in class action litigation, including as leverage for the resolution of even meritless antitrust claims, businesses may be less likely to offer or develop platform services in the future. Because consumers and smaller sellers have enjoyed the greatest gains under the platform model, those same groups can expect to experience the most serious

losses should innovation and competition for platform services be deterred.

For these reasons, the decision of the court of appeals should be reversed.

ARGUMENT

I. The Ninth Circuit's Formalistic Approach Improperly Exposes Defendants to "Pass-On" Theories of Harm that Lead to Duplicative Damages Claims in Conflict with this Court's Precedents and the Clayton Act

In *Illinois Brick*, this Court held that the Clayton Act's treble-damages remedy is not available to a plaintiff who relies on a "pass-on theory" of injury—that is, harm based on a defendant unlawfully overcharging a third party, which the third party passes on to the plaintiff. 431 U.S. at 736. The *Illinois Brick* prohibition against "pass-on" injury claims follows logically from the Court's earlier decision in *Hanover Shoe*, which held that the first direct purchaser should be entitled to recover the full amount of an alleged overcharge. *Hanover Shoe v. United Shoe Mach. Corp.*, 392 U.S. 481, 493–94 (1968). Given that the first purchaser can recover 100 percent of an overcharge, allowing other purchasers to whom such costs might be passed on also to recover damages "would create a serious risk of multiple liability for defendants," a result not intended by Section 4 of the Clayton Act. *Illinois Brick*, 431 U.S. at 730; *see also Kansas v. Utilicorp United Inc.*, 497 U.S. 199, 212 (1990) ("The *Illinois Brick* rule . . . serves to eliminate multiple recoveries.").

The Ninth Circuit's decision below flatly contradicts these principles. It expands the scope of liability well beyond the treble damages Congress provided for by statute. By granting standing to Respondents to pursue a pass-on theory of harm, the court of appeals "'open[ed] the door to duplicative recoveries' under § 4," *Illinois Brick*, 431 U.S. at 731 (citation omitted), and invited the very harm *Illinois Brick* aimed to prevent.

The Ninth Circuit's erroneous decision is rooted in at least three layers of faulty analysis.

A. The Ninth Circuit Misunderstood that Apple's Multi-Sided Platform Service Differs Significantly from the Role of the Traditional "Distributor"

First, the Ninth Circuit placed undue weight on the conventional business models analyzed in prior cases, resulting in a decision that prioritizes labels over market realities. Rather than examining the rationales articulated in *Hanover Shoe*, *Illinois Brick*, and *Utilicorp*—including their prominently stated concerns about duplicative treble damages—the Ninth Circuit looked only at the surface-level facts of those cases, which involved classic vertical supply chain models in traditional industries for shoes,[4] concrete blocks,[5] and natural gas.[6] In placing outsize importance on these particular factual scenarios, and neglecting *Illinois Brick*'s basic principles, the court of

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[4] *Hanover Shoe*, 392 U.S. at 483–84.

[5] *Illinois Brick*, 431 U.S. at 726–27.

[6] *Utilicorp*, 497 U.S. at 204.

appeals missed the forest for the trees.

The result is a decision that embraces "formalistic distinctions" at the expense of "actual market realities," an approach that this Court has specifically criticized in antitrust law. *Am. Express*, 138 S. Ct. at 2285 (quoting *Eastman Kodak*, 504 U.S. at 466–67). Assigning every economic actor to one of two categories—either "manufacturer" or "distributor"—is misconceived. That binary approach fails to take into account the market realities that have developed through new technological and business models, including the digital platform at issue here. Instead, the court of appeals attempted to shoehorn Apple's iPhone platform into the traditional vertical supply chain model. But Apple—like other digital platform services—does not fit into the conventional "distributor" category. The result is an expansion of antitrust standing incompatible with the principles of *Illinois Brick*.

B. The Ninth Circuit Failed to Appreciate that Respondents Are Indirect Purchasers of the Alleged Monopolized Service

Second, the Ninth Circuit failed to correctly identify the allegedly monopolized service, as well as the fact that Respondents are *in*direct purchasers of that service. As used in *Illinois Brick*, the term "direct purchaser" did not extend standing to every party that had *some* dealings with the defendant. Instead, "direct purchaser" was used to describe the party that first purchased the good or service at issue—in other words, the party suffering "direct" and not "passed-on" injury. Here, the allegedly "monopolized" product is

Apple's app-distribution services for developers. *See* Pet. App. 41a (¶ 3). At best, Respondents are *in*direct purchasers of this service.[7]

In sharp contrast to the Ninth Circuit's flawed analysis, the Eighth Circuit's decision in *Campos v. Ticketmaster Corporation*, 140 F.3d 1166 (8th Cir. 1998), comports with this Court's precedents and well-established principles of antitrust standing. There, the court of appeals held that the plaintiff ticket-buyers were indirect purchasers because, while they may have paid "some portion of the monopoly overcharge" to the defendant platform service, they did so "only because the previous purchaser [i.e., the concert venue] was unable to avoid that overcharge." *Campos*, 140 F.3d at 1170; *see also id.* at 1169 ("An indirect purchaser is one who bears some portion of a monopoly overcharge only by virtue of an antecedent transaction between the monopolist and another, independent purchaser."). The same is true here: Respondents are "indirect purchasers" for the purpose of antitrust standing because any overcharge they paid is only because app *developers* were allegedly unable

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[7] By extending the scope of liability to those only remotely affected by the alleged conspiracy, the Ninth Circuit's decision also dramatically expands the pool of potential antitrust plaintiffs in a lawsuit against a platform service. That outcome is even more concerning where lawsuits are likely to take the form of massive consumer class-action complaints that put a tremendous pressure on defendants to settle even meritless claims. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558–59 (2007) (describing burdensome nature of discovery expenses for antitrust class actions).

to avoid an overcharge, which was then passed along.[8] Indeed, Respondents have asserted that app prices are higher because app developers "mark-up the price [of their apps]" to recover part or all of Apple's commission. Pepper CA9 Br. 35 n.10.

C. The Ninth Circuit's Decision Ignores that Respondents Rely on a Pass-On Theory of Harm that Subjects Multi-Sided Platform Services to a Risk of Duplicative Recovery

Finally, and most importantly, by dwelling on traditional supply chain models and prioritizing labels over substance, the Ninth Circuit asked the wrong question. The relevant consideration is not whether a defendant can be characterized as a "distributor" of some product or service, or whether the defendant had any interaction with the plaintiff.

Instead, under *Illinois Brick*, courts should evaluate whether a plaintiff is relying on a "pass-on" theory that exposes defendants to duplicative treble-damages claims. *See* 2A Phillip E. Areeda et al., *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 346j (3d ed. 2007) ("When distribution chains are complex, making it difficult to identify who dealt directly and who indirectly, it is less important

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[8] Respondents lack standing regardless of whether app developers in fact sue Apple. This Court has repeatedly rejected claims that a direct purchaser may lack the incentive to sue. *See Illinois Brick*, 431 U.S. at 746; *UtiliCorp*, 497 U.S. at 214 (rejecting request to expand antitrust standing where direct purchasers "lack the incentive to prosecute § 4 cases").

that the court formalistically identify a direct purchaser and more important that it adhere to the principles that the *Illinois Brick* rule reflects.").

There can be no question that Respondents rely on a pass-on theory of injury. Respondents are consumers who purchased iPhone apps. They allege that Apple monopolized the distribution of these apps; that the 30 percent commission that Apple charged the app developers is supracompetitive; and that the supracompetitive commission rate in turn caused app developers to increase their prices to consumers. Stated more simply, Respondents allege that app developers increased their prices to consumers in order to "pass on" the overcharge for distribution services suffered by the app developers due to Apple's alleged supracompetitive 30-percent commission. Respondents' claim is thus based on their allegation that they "paid more for their iPhone apps than they would have paid" in the absence of the alleged monopolization. Pet. App. 53a (¶ 45).

The Ninth Circuit's allowance of such a "pass-on" theory to support standing for Respondents threatens to subject Apple to duplicative treble-damages claims because the suit by consumers would be in addition to any suit brought by a direct purchaser who would rightly have standing based on such allegations. Indeed, the Ninth Circuit forecasted this duplicative damages exposure. While declining to "address the question whether Apple sells distribution services to app developers within the meaning of *Illinois Brick*," the court noted that, if Apple did sell such services, "this would necessarily imply that the developers, as

direct purchasers of those services, could bring an antitrust suit against Apple." Pet. App. 20a. This explicitly acknowledges that, under the Ninth Circuit's theory, manufacturers of physical goods are subject to less antitrust liability than companies providing matchmaking services.

The potential for duplicative damages is not merely a practical concern but a statutory imperative. Section 4 of the Clayton Act authorizes "threefold" damages recovery, but no more. 15 U.S.C. § 15(a).

II. The Decision Below Converts a Key Virtue of Digital Platform Services into Potential Antitrust Liability in Disregard of Modern Market Realities

Multi-sided, digital platform services drive major portions of today's digital economy.[9] Where many businesses add value by turning raw materials into finished products or delivering products to end users, platform services create value by bringing market participants together, reducing practical barriers and transaction costs in the process. A digital platform service brings together different sides of a transaction, helping buyers find sellers and vice-versa. Where the

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[9] *See* Evans & Schmalensee, *Matchmakers*, *supra* note 3, at 8 ("Three of the five most valuable companies in the world in 2015 . . . use [the multi-sided platform] model. So do seven of the ten start-ups with the highest market values . . . .") (citation omitted); *see also* Joshua D. Wright & John Yun, *Stop Chug-a-lug-a-lugin 5 Miles an Hour on Your International Harvester: How Modern Economics Brings the FTC's Unfairness Analysis Up to Speed with Digital Platforms*, 83 Geo. Wash. L. Rev. 2130, 2135–36 (2015) ("Platforms are ubiquitous in the modern economy.").

traditional manufacturing business model relies on vertical supply chains, the platform business model offers a "place that helps [to connect] different types of customers."[10]

Digital platforms bear some resemblance to more familiar forums, like shopping malls and classified ads. But companies at the leading edge of technological innovation—including many of CCIA's members—have harnessed newly-available technology to refine, expand, and transform the platform business model. As a result, platform services now bring together vast, interrelated sets of buyers and sellers, yielding enormous benefits for both groups. The pervasive influence of platforms has led prominent economists to declare the arrival of a new "platform age."[11]

The decision below ignores—and threatens to upset—these business and technological innovations. As discussed, the Ninth Circuit relied solely on simplistic notions of "manufacturer" and "distributor," prioritizing labels over substance despite well-settled

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[10] Evans & Schmalensee, *Matchmakers*, *supra* note 3, at 16; *see also* David S. Evans & Richard Schmalensee, *Markets with Two-Sided Platforms*, 1 Issues in Competition L. & Pol'y 667, 669 (2008) ("A platform operating in a two-sided market serves two or more distinct sets of customers who, in some way, rely upon each other—and accordingly upon the platform—to realize the particular value the platform provides.").

[11] Evans & Schmalensee, *Matchmakers*, *supra* note 3, at 40 ("The platform age is upon us because of the development of powerful information and communications technologies that have lowered the cost and increased the reach of connecting platform sides."); *see also id.* at 19 (citing "[t]he birth of the commercial Internet in the mid-1990s and mobile broadband in the early 2000s" as fueling the rise of the platform).

antitrust principles. *See Am. Express*, 138 S. Ct. at 2285. Companies providing multi-sided platform services do not fall neatly within traditional, vertical-supply categorizations. To allow "pass-on" injury claims against any company that connects sellers and buyers would risk exposing those companies to duplicative treble-damages recoveries, the very harm *Illinois Brick* sought to prevent.

Faced with the looming potential for outsize liability, businesses may reconsider how, to whom, or even whether to offer multi-sided platform services. Platform development is likely to be chilled as a result, with consumers and sellers—particularly small and medium-sized sellers—ultimately bearing the cost. These groups have enjoyed tremendous benefits from digital platform services, and they would experience significant harms in the event that platform services are curtailed. *See, e.g.*, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 895 (2007) (noting that courts should avoid "increas[ing] the total cost of the antitrust system by prohibiting procompetitive conduct the antitrust laws should encourage"); *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993) ("[T]his Court and other courts have been careful to avoid constructions of § 2 which might chill competition, rather than foster it.").

A. The Ninth Circuit's Approach Threatens Digital Platform Services that Connect Sellers and Consumers in Innovative and Efficient Ways

Multi-sided, digital platform services have proliferated in recent years and have become an integral

part of the business models of many innovative companies, including CCIA members. By providing a centrally administered platform, these "matchmaking" services create significant value for both sellers and buyers in a number of different ways.[12]

First, companies operating successful digital platform services strive to provide a good consumer experience in order to retain buyers on the platform. This may include curating inventory to ensure sellers' offerings are high-quality, and "adopting standards, rules, and enforcement mechanisms to deal with externalities among platform participants."[13] The result benefits buyers *and* sellers, since high-quality offerings are essential to maintaining a sturdy base of customers.

Social media platforms, for example, create and maintain a high-quality user experience by enforcing community standards that govern various user groups. Twitter has developed a comprehensive set of "Twitter Rules" to "protect the experience and safety" of its users,[14] and the site has developed "Twitter Ads

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[12] David S. Evans, *The Consensus Among Economists on Multi-sided Platforms and the Implications for Excluding Evidence That Ignores It* at 3, *in* 6(1) CPI Antitrust Chronicle (June 2013), (multi-sided platforms "create value by coordinating the demands of multiple groups of customers").

[13] David S. Evans, *The Antitrust Analysis of Rules and Standards for Software Platforms*, 10 Competition Pol'y Int'l 71, 72 (2014).

[14] Twitter, The Twitter Rules, https://help.twitter.com/en/rules-and-policies/twitter-rules.

Policies" to ensure that its advertisements are professional and respectful.[15] By contrast, commentators have attributed MySpace's market decline in part to insufficient management of advertisements and offensive content.[16]

Second, platform services enable consumers to make purchases with greater confidence that the sales process is trustworthy. That also benefits sellers in the form of greater customer reach and higher sales volumes. Because they permit consumers to make purchases through companies they trust, well-known platforms serve a valuable role in facilitating transactions between potential buyers and smaller, lesser-known sellers.

Companies often provide centralized payment processing as part of the bundle of platform services. Etsy and Wayfair are two examples.[17] Platform payment services benefit consumers by limiting the

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[15] Twitter, Twitter Ads Policies, https://business.twitter.com/en/help/ads-policies/introduction-to-twitter-ads/twitter-ads-policies.html#.

[16] Felix Gillette, *The Rise and Inglorious Fall of Myspace*, Bloomberg Businessweek (June 22, 2011), https://www.bloomberg.com/news/articles/2011-06-22/the-rise-and-inglorious-fall-of-myspace (among other things, discussing how the profusion of advertisements—including "gross-out ads"—negatively impacted the MySpace user experience).

[17] Etsy, Etsy Payments, https://www.etsy.com/payments (explaining that the Etsy payments system "allows buyers to pay using any of our 10 payment options in Etsy shops worldwide" and "in their local currency"); Wayfair, *What payment methods*

sharing of sensitive payment information to the trusted platform rather than each individual seller. Consumers can also store payment credentials centrally with the platform, which enables easier and faster transactions.[18] By lowering transaction barriers and facilitating sales, these tools also benefit sellers. Furthermore, well after a sale is completed, some platform services further increase reliability by providing customer service and satisfaction guarantees that supplement what sellers provide directly.[19]

Another ubiquitous mechanism for achieving reliability is the user rating. Online retail platform services like Etsy, for example, include built-in seller rating systems that allow consumers to shop with confidence and sellers—including small and medium-sized businesses—to enhance their reputation and visibility, and thus their reach and sales.[20] Similarly,

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do you accept?, https://www.wayfair.com/help/article/what_payment_methods_do_you_accept (listing over a dozen available payment methods).

[18] That a company provides payment processing services on its platform does not mean, however, that it is a "reseller" in the traditional sense. Much like a more traditional credit card processing service, technological developments allow the platform to facilitate payment transactions between a buyer and seller without taking "ownership" of the underlying product.

[19] *See, e.g.*, Etsy, Buyer Case Resolution, https://www.etsy.com/legal/policy/buyer-case-resolution/243306 189901 ("With Etsy's case system, members work together to resolve disputes that result in a non-delivery or are not as described."); Wayfair, Frequently Asked Questions, https://www.wayfair.com/help/faq.php (describing various customer support services).

[20] *See* Etsy, The Review System for Sellers, https://help.etsy.com/hc/en-us/articles/360000572708-The-Review-System-for-Sellers (explaining that "[b]uyers use Etsy's five-star review system (one

dining reservation services like OpenTable and Resy allow diners to rate restaurants, facilitating the flow of information about the quality of dining experiences.[21]

Third, platform services allow consumers to compare products and services across a vast number of sellers, which encourages innovation and price competition among sellers. Platform services also make it easier for buyers to connect and compare sellers through search and posting tools.

For example, travel websites like Booking.com and Hotel Tonight enable consumers to compare travel options from hundreds of different airlines and hotel companies.[22] E-commerce websites like Wayfair similarly allow consumers to evaluate hundreds of products, along with detailed product information,

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being the lowest and five being the highest) to review their purchases" and outlining review policies).

[21] OpenTable, Press Room, http://press.opentable.com ("The OpenTable service enables diners to see which restaurants have available tables, select a restaurant based on verified diner reviews, menus, and other helpful information, and easily book a reservation.").

[22] Booking.com "website and mobile apps are available in 43 languages, offer over 1.5 million properties and cover more than 121,000 destinations in 229 countries and territories worldwide." Booking Holdings, Booking.com, https://www.bookingholdings.com/brands/booking. Hotel Tonight "partner[s] with top-rated hotels" to identify "unsold rooms" and "each day's best deals." Hotel Tonight, *What We're About*, https://www.hoteltonight.com/about.

with every search.[23] These sites and many others place thousands of products and services side by side—lowering search costs and spurring price competition and innovation.

Real estate platforms like Redfin allow homebuyers to sort through lists of potential homes using filters—such as price, square footage, and location—across a large inventory of properties for sale.[24] Likewise, marketplace platforms like Wayfair and Etsy allow consumers to filter inventory from different sellers in various ways.

Finally, the rise of the platform economy has facilitated the development of new products and services and the entry of new competitors. Consumers seeking meal delivery used to be limited to pizza and a handful of neighborhood restaurants. But the explosion of meal-ordering applications, such as DoorDash, Postmates, and Caviar, created a new service, and consumers can now choose from a wide range of restaurant options to enjoy from the convenience of their homes.[25] Restaurants in turn benefit by broadening

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[23] For example, Wayfair operates a system of online ratings for what it describes as "one of the world's largest online selections of furniture, home furnishings, décor and goods, including more than ten million products from over 10,000 suppliers." Wayfair, About Wayfair, https://www.wayfair.com/v/about/wayfair.

[24] Redfin Press Center, About, http://press.redfin.com/phoenix.zhtml?c=252734&p=irol-about (online real estate platform with 80,000 customers that has facilitated over $47 billion in home sales).

[25] *See* Carsten Hirschberg et al., *The Changing Market for Food Delivery*, McKinsey & Co. (Nov. 2016), https://www.mckinsey.com/industries/high-tech/our-insights/the-changing-market-

their dining audience without having to expand their real estate space or ramp up their own delivery capabilities.

New products result in part from a platform service's ability to lower start-up costs for small businesses. For example, "online commerce platform[s]" like eBay have been shown to "empower[] the very smallest of businesses" to compete with larger companies even without "comparable in-house experience, expertise and resources."[26] Etsy, which connects "1.9 million active sellers" with "31.7 million active buyers," is an example of a platform service that lowers barriers to entry for new sellers and actively seeks to develop "creative entrepreneurs"—noting on its website that "[a]ll it takes is 20 cents to get started."[27] Similarly, on LetGo—"the largest and fastest growing app to buy and sell locally"—users can post a listing for free.[28]

Particularly relevant to this case, smart phones provide an example of how digital platform services provide consumer benefits. Mobile operating systems facilitate innovation by serving as a platform for *other* platforms—specifically, apps—which are constructed

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for-food-delivery ("Online food-delivery platforms are expanding choice and convenience, allowing customers to order from a wide array of restaurants with a single tap of their mobile phone.").

[26] eBay, *Platform-Enabled Small Businesses and Inclusive Economic Opportunities* at 3 (2016), https://www.ebaymainstreet.com/sites/default/files/ebay_report_pesbieo_vf.1_1.pdf.

[27] Etsy, Keep Commerce Human, https://www.etsy.com/about.

[28] LetGo, Who We Are, https://we.letgo.com.

as add-ons to mobile platforms.[29] "[O]perating systems for mobile devices have put the power of computers in the hands of billions of people and have enabled millions of developers worldwide to create apps for them."[30] Relatedly, because mobile operating platforms provide app developers with a highly efficient system for delivering their products to consumers, they need little in the way of start-up capital.[31] That opens the door to a wider variety of app developers and provides consumers with a broader selection of apps.

In all of these ways, multi-sided, digital platform services benefit consumers and sellers by "reduc[ing] frictions that get in the way of economic agents finding each other, interacting, and exchanging value on their own."[32] By bringing together large numbers of sellers and consumers—and lowering the costs required for them to interact—digital platform services

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[29] *See* Evans & Schmalensee, *Matchmakers*, *supra* note 3, at 40 (discussing "the creation of foundational multisided platforms" or "platforms-for-platforms," which include "fixed and mobile Internet service providers . . . and computer operating systems").

[30] *Id.* at 47.

[31] For example, "an individual or sole proprietor/single person business interested in creating apps for distribution on the App Store for iPhone, iPad, Mac, and Apple Watch" can "enroll in the Apple Developer Program" for $99 per year. Apple, Support: Choosing a Membership, https://developer.apple.com/support/compare-memberships. "Membership includes access to beta OS releases, advanced app capabilities, and tools to develop, test, and distribute apps and Safari extensions." *Id.*

[32] David S. Evans, *Multisided Platforms, Dynamic Competition, and the Assessment of Market Power for Internet-Based Firms*, Coase-Sandor Working Paper Series in Law and Economics, No. 753 (2016).

have delivered great benefits to both. Online platform services occupy an important role as matchmaker in today's digital economy, akin to the matchmaking role played by shopping malls and classified ads in earlier eras. If left standing, the Ninth Circuit's ruling could apply to the platform services described above and other matchmaking services in harmful and unintended ways.

B. Exposing Companies Offering Digital Platform Services to Duplicative Treble-Damages Claims Would Chill Innovation and Harm Consumers and Sellers

As described *supra* in Part I, the Ninth Circuit's ruling *invites* duplicative treble damages exposure by providing antitrust standing to multiple sets of plaintiffs under the Clayton Act's Section 4 based on a pass-on theory rooted in an initial alleged overcharge. The ruling threatens disproportionate harm to platform services that goes well beyond the treble damages Congress authorized by statute.

Businesses offering platform services are uniquely vulnerable under the Ninth Circuit's flawed analysis because they frequently interface directly with multiple distinct groups. The ruling would permit essentially any entity that uses a platform to allege an antitrust violation by the platform and sue the platform for treble damages based on a theory of passed-on overcharge, while at the same time barring a defendant from asserting a pass-on defense. In other words, the Ninth Circuit's decision converts the

chief virtue of a platform—fostering an efficient market for buyers and sellers to interact—into a potentially massive antitrust liability.

The result is foreseeable: If operating a digital platform service risks duplicative treble-damages lawsuits from every front (including class actions), companies providing these services likely will be less inclined to operate, expand, and innovate going forward. And by disproportionately affecting platform services, such increased antitrust exposure will chill new entry into this space. Thus, exposing companies to massive liability, simply for serving as an intermediary between parties, puts at risk the numerous benefits that digital platform services provide to both sellers and consumers.

Additionally, if companies providing platform services face increased exposure to treble-damages recoveries based on sales of third-party products and services, they may be less inclined to provide their services to third parties at all. Companies may instead choose to follow the single-sided platform model and focus on their own proprietary products, or at least reduce the number of platform partners. As a result, third-party sellers—particularly smaller and newer third-party sellers—would have fewer options to sell through platforms, and consumers would lose access to the broad variety of sellers currently available on platforms.

Apple, for example, started as a single-sided firm and did not allow third-party applications on the iPhone. Apple changed its model after seeing the benefits

of enabling a broader app ecosystem on competing mobile platforms. App developers and consumers likely would be worse off if Apple reverted to its original model.

The fallout from a reduction in platform services would not necessarily be limited to current platform users. In advanced economies like the United States, "[i]nnovation is the primary driver of economic growth."[33] By limiting incentives to innovate with new business models, the economy as a whole may suffer. Given the link between innovation and economic growth, "[c]aution and humility" is warranted in evaluating "innovative business practices."[34]

CONCLUSION

As applied to multi-sided, digital platform services, the decision below invites claims that rely on a flawed and unduly expansive conception of standing to avoid *Illinois Brick*'s bar on pass-on recovery. This

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[33] *See* David Teece, *Next-Generation Competition: New Concepts for Understanding How Innovation Shapes Competition Policy in the Digital Economy*, 9 J.L. Econ. & Pol'y 97, 196 (2012); *see also* Howard A. Shelanski, *Information, Innovation, and Competition Policy for the Internet*, 161 U. Pa. L. Rev. 1663, 1666 (2013) (antitrust authorities and scholars have long recognized the importance of innovation to economic growth and social welfare); Geoffrey A. Manne & Joshua D. Wright, *Innovation and the Limits of Antitrust*, 6 J. Competition L. & Econ. 153, 183 (2010) ("[T]here is a robust body of literature establishing the contributions of technological innovation to economic growth and social welfare.").

[34] Joshua D. Wright, Antitrust, Economics, and Innovation in the Obama Administration, *GCP: The Antitrust Chronicle* (Nov. 2009).

error exposes businesses offering digital platform services to massive and improper antitrust liability that is likely to harm competition, innovation, and consumers.

For the foregoing reasons, the decision of the court of appeals should be reversed.

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APPLE, INC.,
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v.

ROBERT PEPPER, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* OPEN MARKETS INSTITUTE IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE* AND SUMMARY OF ARGUMENT[1]

The Open Markets Institute is a non-profit organization dedicated to promoting fair and competitive markets. It does not accept any funding or donations from for-profit corporations. Its mission is to safeguard our political economy from concentrations of private power that undermine competition and threaten liberty, democracy, and prosperity. The Open Markets Institute regularly provides expertise on antitrust law and competition policy to Congress, journalists, and other members of the public. The vigorous enforcement of the antitrust laws against large corporations, including powerful technology platforms, is essential to protecting the U.S. economy and democracy from concentrated private power. Private antitrust enforcement is an essential part of the overall antitrust enforcement system and helps deter, and provide compensation to the victims of, antitrust violations.

The Open Markets Institute files this brief to make three points. First, contrary to the claims of Apple and its *amici*, Apple's App Store is not a neutral, open marketplace (or in Apple's words, a provider of "distribution services"). Pet. Br. 5. Instead Apple has established through contractual and technical restrictions a monopoly over the distribution of iPhone apps. By creating and maintaining this monopoly, Apple compels owners of iPhones and developers of iPhone apps to conduct business on Apple's terms. Through its App Store bottleneck, Apple exercises power over both iPhone

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[1] No counsel for a party authored this brief in whole or in part and no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of *amicus* briefs are on file with the Clerk.

owners (as a seller) and iPhone app developers (as a buyer).

Second, consumers of iPhone apps are authorized to sue Apple to recover damages for its alleged monopolization of the retail iPhone-app market under a straightforward application of this Court's direct-purchaser rule. That rule, as the Court held in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), and reaffirmed in *Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199 (1990), holds that indirect purchasers of a monopolized good may not sue the monopolist for any overcharge that they paid. Instead, the cause of action is for the direct purchaser to assert—the one who bought the good from the monopolist and paid the full overcharge. Because all iPhone apps must be purchased directly from Apple, consumers are direct purchasers.

The only way Apple can prevail in this appeal, therefore, is if this Court were to create a new exception to the direct-purchaser rule. But there is no basis for any exception here. For one thing, this Court has consistently refused to get into the business of carving out case-by-case exceptions. A bright-line rule, the Court has explained, beats the "unwarranted and counterproductive exercise [of] litigat[ing] a series of exceptions." *UtiliCorp*, 497 U.S. at 217. The Court has been firm on this point: "The possibility of allowing an exception, even in rather meritorious circumstances, would undermine the rule." *Id.* at 216. Apple's position, for instance, directly contravenes this Court's decision in *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 494 (1968), which holds that antitrust violators are "not entitled to assert a passing-on defense."

The third part of this brief takes on a central plank of Apple's argument: that permitting consumers to sue for

damages would open the door to double recovery. This policy concern, which was one of the reasons discussed in *Illinois Brick*, is misplaced here. The double-recovery concern in *Illinois Brick* was a concern about recovering twice for the *same kind of harm* caused by the *same antitrust violation*—an overcharge imposed by a monopoly supplier. But if a developer were to take the step of suing Apple in a separate case, it would do so not as a fellow buyer of the same product from a monopolist (the only *seller* in town), but as a supplier of a product to a monopsonist (the only *buyer* in town).

There is no principle in antitrust law holding that antitrust violators exercising market power in both directions on the supply chain cannot be held to account for the distinct harms that they inflict on distinct entities. The law actually cuts the other way: Just as a monopolist can be separately sued by competitors (for lost profits) and consumers (for overcharges), a firm that is both a monopsonist and a monopolist can be separately sued by sellers (for underpayments) and buyers (for overpayments).

In this case, app developers are not likely to seek damages for potential antitrust injuries from the exercise of Apple's monopsony power. Developers who bring suit against Apple risk jeopardizing their access to the App Store, as Apple can seek retribution against them in any of a myriad of different ways. In addition, many app developers may be unwilling to sue Apple for its monopolization of the app distribution market due to a perception that Apple may manipulate the pricing and sale of the apps in ways that ultimately benefit the developers. Consequently, adopting Apple's position that only app developers have an antitrust cause of action may mean that *no one* brings a suit for damages against

Apple over potential antitrust violations in the iPhone distribution market.

ARGUMENT

I. Apple has established a bottleneck over the distribution of iPhone apps.

In the textbook ideal of a marketplace, no single buyer or seller exercises power. Instead many buyers and sellers come together to engage in economic activity. Furthermore, new buyers and sellers face no barriers and can enter the market freely. Due to this decentralized, open market structure, power is broadly dispersed and not exercised by one or a small number of market participants.

Since the Founding, America's citizens have used a great variety of regulatory tools to achieve such open market structures. This includes the establishment of public markets in which to sell and buy. It also includes using various forms of regulation, including antitrust law, to ensure that private markets are governed in a fair, transparent manner. *See, e.g.*, *Silver v. N.Y. Stock Exch.*, 373 U.S. 341 (1963). Americans have repeatedly updated their regulatory tools to address radical changes in technology, such as the advent of the railroad, the telephone, and the Internet. *See, e.g.*, Richard R. John, *Network Nation* (2010) (examining the history of federal and state legislation and regulation to control private power in telegraph and telephone services). The basic goal, time and again, was to ensure that the private corporations that control these monopoly networks do not exploit their essential middleman position to enclose the markets and regulate sellers and buyers in ways that serve their own private ends.

Apple and its *amici*, at least implicitly, characterize Apple's App Store as a neutral provider of "distribution services." Pet. Br. 5. But the reality here is quite different. Apple, through contractual and technical restrictions, has established itself as the sole distributor of apps for the iPhone. In the iPhone-app distribution market, Apple resembles other dominant technological platforms, such as Amazon and Uber, that exercise power over both suppliers of goods and services and customers. Evgeny Morozov, *Where Uber and Amazon rule: welcome to the world of the platform*, The Guardian, June 6, 2015, https://perma.cc/7QQ7-GWEZ. In other words, Apple has acquired a bottleneck position *between* iPhone owners and iPhone app developers, requiring both groups to transact exclusively through the App Store. This monopolistic control of iPhone-app distribution enables Apple to dictate terms to both iPhone users and iPhone app developers.

From the point of view of iPhone buyers, Apple's direct control over, and regulation of, the market for apps has a number of effects. This includes long-term locked-in dependency on Apple for the provision of all additional products related to the iPhone. It also includes having to pay supracompetitive prices for such products; in the case of apps the price must cover Apple's 30 percent surcharge on every app that it sells.[2] This includes being made subject to the particular, and

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[2] Jobs himself emphasized the link between the iPhone and App Store. Part of the idea behind the App Store, as he envisioned it, was to "add value to the iPhone," allowing Apple to "sell more iPhones because of it." Nick Wingfield, *"The Mobile Industry's Never Seen Anything Like This": An Interview With Steve Jobs at the App Store's Launch*, Wall St. J., Aug. 7, 2008, https://on.wsj.com/2v4Mu3M.

arbitrary, political and moral rules that Apple uses to regulate the nature of the apps that are available for sale to iPhone customers. And it includes being made subject to arbitrary, discriminatory manipulation in the act of shopping for and buying apps.

As the sole distributor of iPhone apps, Apple, as a buyer, *also* directly exercises market power over app developers. It creates and imposes contractual terms that it alone has the power to change. In addition to retaining 30% of the purchase price, Apple requires that the price for any app end in 99 cents. This 99-cent rule eliminates the vast majority of possible prices that could be charged for each app. Apple has also used its power as the sole distributor of iPhone apps to impede market access to apps that compete against its own services. *See, e.g.*, Peter Kafka, *Spotify Says Apple won't approve a new version of its app because it doesn't want competition for Apple Music*, Recode, June 30, 2016, https://perma.cc/BZ3G-V4J2. Apple has also excluded apps from the App Store for entirely arbitrary reasons. *See, e.g.*, Jason Koebler, *Apple Is Blocking an App That Detects Net Neutrality Violations From the App Store*, Vice Motherboard, Jan. 18, 2018, https://bit.ly/2FODwvY. Through the App Store, Apple exercises extraordinary control over individuals and businesses developing and improving apps for the iPhone.

II. Consumers of iPhone apps have a cause of action against Apple under the direct-purchaser rule, and no exception to that rule is warranted.

Section 4 of the Clayton Act grants a cause of action for treble damages to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15(a). The question in this case concerns the meaning of this language. Have

the plaintiffs—consumers of iPhone apps, all of whom purchased those apps directly from Apple—adequately alleged that they have been injured "by reason of" Apple's monopolization of the retail market for iPhone-apps, such that they can sue Apple for damages under section 4?

The answer is yes.

The plaintiffs in this case are direct purchasers entitled to sue under the direct-purchaser rule. Due to Apple's successful efforts to enclose and regulate the market for iPhone apps, buyers of apps are prevented from forming a direct relationship with the developers of apps. Instead, buyers receive apps directly from Apple, through the App Store that Apple pre-installed on their iPhones. Apple collects the full purchase price from them, stores their billing information, and processes the sale. No intermediary is involved. And all this is by Apple's own design: Steve Jobs, Apple's former CEO, said at the time the App Store was launched that Apple wanted to be able to "wirelessly deliver the content right on the device," and to "automatically update the apps" for consumers. Wingfield, *An Interview With Steve Jobs.* The App Store, he said, was "built on the same iTunes infrastructure, including all the storage and all the billing and getting email receipts and all of that kind of stuff." *Id.*

Apple's own actions ensure that the consumers' relationship is directly with Apple. Consumers may therefore sue Apple for any overcharge imposed as a result of Apple's monopoly over the retail market for iPhone apps.

Because a straightforward application of the direct-purchaser rule authorizes this suit, Apple asks this Court to carve out an exception to the bright-line rule. Characterizing itself as the provider of "distribution services,"

Pet. Br. 5, Apple argues that consumers should not be allowed to sue it for damages because iPhone "app prices are independently set by developers," meaning that consumers are harmed only "to the extent that the developers choose to pass-through" the overcharge in the form of higher app prices. Pet. Br. 6. In other words: Apple mounts a pass-through defense. But, as discussed earlier, this mischaracterizes Apple's App Store, which exists as an intermediary between iPhone owners and iPhone app developers and functions as a buyer and seller of apps.

This Court has held for half a century that antitrust violators are "*not* entitled to assert a passing-on defense." *Hanover Shoe*, 392 U.S. at 494 (emphasis added). As the Court put it in *Hanover Shoe*: "As long as the seller continues to charge the illegal price, he takes from the buyer more than the law allows." *Id.* at 489. Hence the settled rule that "when a buyer shows that the price paid by him for [a product] is illegally high and also shows the amount of the overcharge, he has made out a prima facie case" for damages against the antitrust violator. *Id.* The upshot of this rule is that "direct purchasers are not only spared the burden of litigating the intricacies of pass-on but also are permitted to recover the full amount of the overcharge." *Illinois Brick*, 431 U.S. at 745–46. And that's true whether some, none, or all of the overcharge is later passed on; direct purchasers may recover the full amount *regardless*.

Since *Hanover Shoe*, this Court has consistently refused to "create an exception to the direct purchaser rule." *UtiliCorp*, 497 U.S. at 207; *see also Illinois Brick*, 431 U.S. at 744 ("We reject these attempts to carve out exceptions to the [direct-purchaser] rule for particular types of markets."). Indeed, the Court has applied the

rule even when the direct purchaser might not have suffered *any* injury from the overcharge because the *full* amount was passed through to purchasers. *See Utili-Corp*, 497 U.S. at 208–09. Even then, the Court held that the direct purchaser had a cause of action, finding that it would be "inconsistent with precedent and imprudent in any event to create an exception." *Id.* at 208; *see also id.* at 216 ("The possibility of allowing an exception, even in rather meritorious circumstances, would undermine the rule."); *id.* at 217 ("[E]ven assuming that any economic assumptions underlying the *Illinois Brick* rule might be disproved in a specific case, we think it an unwarranted and counterproductive exercise to litigate a series of exceptions.").

Those words carry equal force here. To start, there is no textual basis for Apple's proposed exception. If anything, the breadth of the language Congress used in section 4—authorizing "any person" injured "by reason of anything forbidden in the antitrust laws"—cuts in the opposite direction. 15 U.S.C. § 15(a). So too does the common-law principle that courts should not "go beyond the first step" in making proximate-cause determinations. *Hanover Shoe*, 392 U.S. at 490 n.8 (quoting *S. Pac. Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533 (1918)). As Justice Holmes explained a century ago, a defendant "ought not to be allowed to retain his illegal profit, and the only one who can take it from him is the one that alone was in relation with him, and from whom [the defendant] took the sum." *Id.* In this case, that describes the consumer.

Apple's proposed exception would also undermine the Clayton Act's "expansive remedial purpose." *Blue Shield of Va. v. McCready*, 457 U.S. 465, 472 (1982). Through section 4, "Congress sought to create a private enforce-

ment mechanism that would deter violators and deprive them of the fruits of their illegal actions, and would provide ample compensation to the victims of antitrust violations," *Id.*; *see also id.* at 477 ("The unrestrictive language of the section, and the avowed breadth of the congressional purpose, cautions us not to cabin § 4 in ways that will defeat its broad remedial objective."). Consistent with that broad purpose, this Court has repeatedly recognized that it is "critical" that section 4 be interpreted in a way that "promote[s] the vigorous enforcement of the antitrust laws." *UtiliCorp*, 497 U.S. at 214. The Court has thus been careful not to "engraft artificial limitations on the § 4 remedy," *McCready*, 457 U.S. at 472, or to "add requirements to burden the private litigant beyond what is specifically set forth by Congress," *Radovich v. Nat'l Football League*, 352 U.S. 445, 454 (1957).

III. Applying the direct-purchaser rule here would not create a risk of duplicative recoveries.

A. A hypothetical antitrust suit by app developers would seek damages for an injury distinct from the injury alleged by consumer-plaintiffs here.

The real thrust of Apple's bid for an exception is its objection that it would be subject to duplicative recovery if the direct-purchaser rule were enforced. As Apple and its *amici* see it, applying the rule here would give rise to a risk that both consumers and developers would sue Apple for the same competitive harm, which was one of the concerns discussed in *Illinois Brick*.

But in the event developers decide to bring an antitrust suit, this policy concern is not present here. The concern identified in *Illinois Brick* had to do with recovering twice for the same harm caused by the same violation—an overcharge imposed on a good supplied by

a monopolist. Allowing both direct and indirect purchasers of that same good to sue for the same overcharge would either lead to double recovery or require complex determinations for allocating damages between direct and indirect purchasers. The Court concluded it was far simpler to allow only the direct purchaser to sue—and to sue for the entire overcharge. While this rule prevents downstream injured purchasers from obtaining compensation under federal antitrust law, *Illinois Brick* and *Hanover Shoe* together are, in theory, designed to promote deterrence by concentrating the full overcharge recovery in one class of purchasers.

This case is different. If developers were to sue Apple in a separate case, they would do so to remedy a distinct harm caused by distinct anticompetitive behavior. Rather than complaining about an overcharge by a seller and seeking recovery of that overcharge (as the consumers seek to do in this case), they would be complaining about an underpayment by a buyer and seeking recovery of that underpayment. There is no unfairness in allowing them do so. If an antitrust violator exercises market power in both directions on the supply chain, it can be held to account for the distinct harms that its anticompetitive conduct inflicts.[3] *See Mandeville Island Farms v. Am. Crystal Sugar Co.*, 334 U.S. 219, 236 (1948) ("[The Sherman Act] does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers.").

Other areas of antitrust law support this outcome. It is hornbook law that a monopolist can be sued by

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[3] This concern is not new or somehow unprecedented. In the congressional debates leading up to the passage of the Sherman Act, a member of the House accused the beef trust of "rob[bing] the farmer on the one hand and the consumer on the other." 21 Cong. Rec. 4098 (1890) (remarks of Rep. Wilson).

competitors for lost profits caused by its monopolization. It is also hornbook law that the monopolist can also be sued by consumers for overcharges. Although this is an imperfect analogy, it illustrates a familiar principle in the law more broadly: when a wrongdoer does something that directly causes different kinds of foreseeable harm to different people, those people are not barred from seeking redress for their harms.[4] Just so here. By putting itself in between developers and consumers—and thereby ensuring that it is the only buyer and seller of iPhone apps, respectively—Apple has exercised market power in both directions on the supply chain. It can be held accountable for the direct harms caused as a result.

B. As a practical matter, developers are unlikely to bring an antitrust suit for damages against Apple.

The most obvious and pragmatic reason that developers would decide not to pursue antitrust claims against Apple is fear of retribution. Developers who sue Apple for antitrust violations run the risk of being removed from the App Store and losing their access to end users—a threat that is not entirely theoretical. *See, e.g.*, Steven Melendez, *Apple tight-lipped on removal of Freedom and other content-blocking apps*, Fast Co., Sep. 20, 2018, https://bit.ly/2OZZP64. *See also* Stephen

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[4] *See McCready*, 457 U.S. at 484 n.21 ("If a group of psychiatrists conspired to boycott a bank until the bank ceased making loans to psychologists, the bank would no doubt be able to recover the injuries suffered as a consequence of the psychiatrists' actions. And plainly, in evaluating the reasonableness under the antitrust laws of the psychiatrists' conduct, we would be concerned with its effects not only on the business of banking, but also on the business of the psychologists against whom that secondary boycott was directed.").

Calkins, *'Illinois Brick' and Its Legislative Aftermath*, 47 Antitrust L.J. 967, 972 n.42 (1978) (noting "there is concern that some direct purchasers may fail to sue out of fear of jeopardizing a relationship with a supplier").

Many app developers may also be hesitant to sue Apple for its monopolization of the app market due to a perception that Apple may manipulate the pricing and sale of the iPhone apps in ways that ultimately benefit the developers. Apple, for instance, requires that the price for any app end in 99 cents. This 99-cent rule eliminates the vast majority of possible prices that could be charged for each app. Given how cheap apps are (most are no more than a few dollars), the rule may cause developers to set prices at a higher level than the market would otherwise demand (for example, $1.99 instead of $1.25 or $1.50). In such an instance, Apple's market power could actually *benefit* the developer.[5]

It goes without saying that someone who benefits from something cannot be counted on to sue to stop the very thing that benefits them (even assuming they could permissibly do so). As Judge Arnold noted in his dissent in *Campos v. Ticketmaster Corp.*, 140 F.3d 1166, 1174 (8th Cir. 1998) (Arnold, J., dissenting), a downstream monopolist can sometimes share its monopoly profits with upstream participants and thereby neutralize hypothetical antitrust plaintiffs. At the very least, the developers' incentive to sue would be significantly less

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[5] Furthermore, the 99-cent rule points up the considerable degree to which Apple exerts control over the prices that iPhone users pay for iPhone apps. Even if Apple does not dictate what the specific price for each app must be, it unquestionably dictates what the price must not be—and that's 99% of the possible options. So although Apple tries to convey the impression that it simply has no say over app prices, that is not true as a factual matter.

than that of the direct purchasers, who paid the supracompetitive prices.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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No. 17-204

IN THE

Supreme Court of the United States

APPLE, INC.,

Petitioner,

v.

ROBERT PEPPER, ET AL.,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR THE R STREET INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

The R Street Institute is a non-profit, non-partisan public-policy research organization. R Street's mission is to engage in policy research and educational outreach that promotes free markets, as well as limited yet effective government, including properly calibrated legal and regulatory frameworks that support economic growth and individual liberty.

SUMMARY OF ARGUMENT

Respondents' claim against Apple should be dismissed, regardless of how the relationship between Respondents, Apple, and iOS application developers is characterized, based on the practical considerations recognized in *Illinois Brick* relating to duplicative recovery, complexity, and justiciability. Respondents' relief lies not with Section 4 of the Clayton Act, but with the Department of Justice, Federal Trade Commission, and state attorneys general.

1. The treble damages remedy provided by Congress in Section 4 of the Clayton Act of 1914 is an extraordinary one that applied too broadly could impose

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[1] Rule 37 statement: All parties received timely notice of *amicus*'s intent to file this brief, and all parties have given their consent. Petitioner consented to this brief and Respondents filed blanket consent for the filing of *amicus* briefs. Petitioner's consent letter has been lodged with the Clerk. Further, no counsel for any party authored this brief in whole or in part and no person or entity other than *amicus* made a monetary contribution to the preparation or submission of this brief.

heavy costs both on the economy—with firms facing potentially massive litigation risks—and on the courts—who would face complex economic theories, sprawling litigation, and the arduous task of distributing any potential damages among all affected parties.

These and other practical considerations gave rise to the *Illinois Brick* rule, which allows only direct purchasers to sue under Section 4 for an alleged antitrust violation. In addition to the concerns about complexity and justiciability noted above, concerns about the prospect of duplicative recovery were also raised. If indirect purchasers were allowed to sue under Section 4, firms would face treble-damages lawsuits not just from their direct purchasers, but potentially anyone in the supply chain who was harmed by the allegedly anticompetitive conduct. Those same practical considerations are present here.

Allowing Respondents' claim to proceed would risk Apple having to suffer through not only one treble-damages suit, but potentially multiple treble-damages suits based on the same conduct from application developers, cloud services providers, hardware makers, or any other affected party in the iOS supply chain. That would not only be unjust, but it would also do tremendous harm to the American economy, particularly the information and communications technology sectors, which have such large customer bases and global supply chains. These factors would also make the monopolization claim against Apple quite complex, as proof of harm and any calculation of damages would both require detailed economic models and

predictions, likely offered by dueling experts from either side. And distributing any awarded damages, if the claim were successful, would also be difficult, as there are tens or even hundreds of millions of iOS users worldwide.

2. Thus, Respondents' complaint should not be allowed to proceed. For consumers like Pepper, their relief lies not with Section 4, but with the Department of Justice, Federal Trade Commission, and state attorneys general. History shows that these actors can provide effective relief to consumers following violations of the antitrust laws. Indeed, these actors can not only adequately protect users, but they are best placed to do so.

The Department of Justice, Federal Trade Commission, and state attorneys general all regularly accept antitrust complaints from consumers like Pepper. These actors also have the authority, expertise, and resources necessary to pursue complex and sprawling antitrust litigation. Additionally, these actors are bound by statutory constraints that protect defendants from potential duplicative recovery or other unjust harms while still providing adequate remedies for aggrieved consumers.

And the antitrust protections offered by these actors are not merely theoretical. These actors have all recently brought antitrust suits against major technology companies, some of which led to substantial refunds and other forms of consumer redress.

For the foregoing reasons, this Court should reverse the Court of Appeals.

ARGUMENT

I. Respondents Lack Antitrust Standing for the Same Practical Considerations Identified in *Illinois Brick*.

"The treble damages remedy of [Section] 4 is an extraordinary one, and must be carefully confined within reasonable limits." *Gregory Marketing Corp. v. Wakefern Food Corp.*, 787 F.2d 92, 98 (3d. Cir. 1986). The *Illinois Brick* rule is one such reasonable limit on Section 4 of the Clayton Act of 1914, Pub. L. No. 63-212, § 4, 38 Stat. 731 (15 U.S.C. § 15), and the practical considerations that led to its creation should drive its application in the present case with equal force. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720, 730–32 (1977).

A. The *Illinois Brick* Rule is Based on Practical Considerations.

In *Illinois Brick*, the State of Illinois sued Illinois Brick Co., a manufacturer of bricks, under Section 4 of the Clayton Act for allegedly colluding to fix prices in violation of Section 1 of the Sherman Act. *Id.*, at 726–27. The State of Illinois did not buy bricks from Illinois Brick Co. directly, but instead purchased buildings from general contractors, who purchased brick structures from masonry subcontractors, who purchased bricks directly from Illinois Brick Co. *Id.* at 726. Ultimately, as an indirect purchaser, the State of Illinois was denied standing in its case against Illinois Brick Co. under Section 4. *Id.*, at 736–48.

Illinois Brick recognized that practical considerations are the primary basis for limiting antitrust

standing under Section 4. And perhaps the strongest practical consideration recognized in *Illinois Brick* was the possibility of duplicative recovery:

> Even though an indirect purchaser had already recovered for all or part of an overcharge passed on to it, the direct purchaser would still recover automatically the full amount of the overcharge that the indirect purchaser had shown to be passed on; similarly, following an automatic recovery of the full overcharge by the direct purchaser, the indirect purchaser could sue to recover the same amount.

Illinois Brick, 431 U.S. at 730. Allowing multiple, treble-damages suits to be brought against the same party for the same conduct would unfairly punish antitrust violators. It would also hurt the economy writ large, as firms facing additional litigation from class-action treble-damages lawsuits by indirect purchasers would likely scale back on investments to compensate for that added risk. Thus, courts have rightfully been "unwilling to 'open the door to duplicative recoveries' under [Section] 4." *Id.* at 731 (citing *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 264 (1972)).

Additionally, *Illinois Brick* recognized the "uncertainties and difficulties in analyzing price and output decisions 'in the real economic world rather than an economist's hypothetical model,'" and "costs to the judicial system and the efficient enforcement of the antitrust laws of attempting to reconstruct those decisions in the courtroom." 431 U.S. 720, 731–32 (1977)

(quoting *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 493 (1968)). Those considerations are primarily about the complexity of antitrust suits. They recognize that antitrust suits frequently require detailed economic modeling—typically in the form of conflicting reports and testimony offered by dueling expert witnesses—both to demonstrate harm and to calculate damages. And with indirect purchasers, those damages calculations for each level of the supply chain would require "virtually unascertainable figures[.]" *Id.* at 725 n.3.

Finally, *Illinois Brick* recognized concerns about justiciability. When the relevant markets comprise millions or even billions of consumers scattered across multiple jurisdictions, the task of managing a case, joining plaintiffs, and distributing damages among all affected parties would be tremendously difficult, if not altogether impossible.

> Permitting the use of pass-on theories under [Section] 4 essentially would transform treble-damages actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge—from direct purchasers to middlemen to ultimate consumers. However appealing this attempt to allocate the overcharge might seem in theory, it would add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness.

Id. at 737. There are rules of civil procedure available to join all potential claimants to a suit, but as a practical matter, "[i]t is unlikely, of course, that all potential plaintiffs could or would be joined. Some may not wish to assert claims to the overcharge; others may be unmanageable as a class; and still others may be beyond the personal jurisdiction of the court." *Id.* at 739.

These practical considerations led to the creation of the *Illinois Brick* rule, and they should drive its application in the present case with equal force.

B. The Practical Considerations Recognized in *Illinois Brick* are Also Present Here.

The practical considerations relating to duplicative recovery, complexity, and justiciability recognized in *Illinois Brick* are also present here. Consider that there are over a billion iOS devices in consumers' hands today, *see* Apple, *Apple Reports First Quarter Results* (Feb. 1, 2018) (available online),[2] millions of iOS application developers, *see, e.g.*, Andy Boxall, *There are 12 Million Mobile Developers Worldwide, and Nearly Half Develop for Android First*, BUSINESS OF APPS (Oct. 7, 2016) (available online), and hundreds of suppliers providing materials, manufacturing, and assembly services to Apple worldwide. *See* Apple, *Supplier List* (Feb. 2018) (available online). There are also countless providers of hosting and content delivery services who might also be harmed by

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[2] URLs for online resources are provided in the Table of Authorities.

Apple's alleged monopolization of the iOS application store.

The rules of civil procedure would allow all potential plaintiffs to join Respondents' case, but many are "beyond the jurisdiction of the personal jurisdiction of the court[,]" and may be "unmanageable as a class," so here, as in *Illinois Brick*, "[i]t is unlikely ... that all potential plaintiffs could or would be joined." 431 U.S. at 738. Thus, if Respondents' were to proceed and ultimately prevail in proving their claim, Apple would have to pay treble damages and attorneys' fees to all the plaintiffs, but that still would not resolve the matter completely. Apple might yet face further treble-damages suits from other plaintiffs who, for one reason or another, refused to join the initial class.

Allowing the monopolization claim against Apple to proceed would also require complex economic models and predictions, likely offered by dueling experts from either side, both to demonstrate harm and to calculate damages. Calculating damages and apportioning them among all affected parties would involve the same "virtually unascertainable figures," that were rejected in *Illinois Brick*, 431 U.S. at 725 n.3. Additionally, if the claim against Apple were successful, distributing the awarded damages would also be difficult, as there may be hundreds of millions or even billions of affected parties worldwide.

In this case, neither the district court nor the Ninth Circuit recognized the practical implications of their decisions, instead focusing only on how to define Respondents' relationship with Apple. *See* Order Granting Apple's Motion to Dismiss Second Amended

Complaint with Prejudice, *In re Apple iPhone Antitrust Litigation*, No. 11-06714-YGR, at 9–10 (N.D. Cal. Dec. 3, 2013); *In re Apple iPhone Antitrust Litigation*, 846 F.3d 313, 322–25 (9th Cir. 2017). But the practical considerations recognized in *Illinois Brick* are present here regardless of how the iOS supply chain is ultimately defined, and all these practical considerations suggest that the *Illinois Brick* rule should apply here to limit Section 4 treble-damages suits for alleged monopolization of the iOS application store to iOS application developers.

II. Respondents Have Effective Relief in the Department of Justice, Federal Trade Commission, and State Attorneys General.

That *Illinois Brick* limits standing under Section 4 does not mean that aggrieved consumers are without recourse. For consumers like Pepper, their relief lies not with Section 4, but with the Department of Justice, Federal Trade Commission, and state attorneys general. And history shows that each of these actors can provide effective relief to consumers following violations of the antitrust laws. In fact, these actors can not only adequately protect users, but they are best able to do so.

A. Role of the Department of Justice

The Department of Justice plays a key role in antitrust. It has the duty to "institute proceedings in equity to prevent and restrain" violations of the Sherman Act. *See* Sherman Antitrust Act of 1890, § 4, 26 Stat. 209 (15 U.S.C. § 4). It also has sole responsibility among federal agencies for policing antitrust violations among firms outside the Federal Trade

Commission's jurisdiction, such as common carriers, non-profits, and banks. *See* Federal Trade Commission Act of 1914, Pub. L. No. 63-203, § 5(a)(2), 38 Stat. 719 (15 U.S.C. § 45(a)(2)).

In performing these responsibilities, the Department of Justice accepts and reviews public complaints about possible violations of the antitrust laws and regularly files suit seeking remedies on behalf of aggrieved consumers. *See* U.S. Dep't of Justice, Antitrust Div., *Report Violations* (available online) (last updated Jan. 29, 2018). In fact, the Department of Justice recently pursued an antitrust action against Apple and successfully obtained remedies for millions of consumers just like Pepper. In 2013, the Department of Justice brought a claim against Apple alleging it had colluded with publishers to fix prices on electronic books. *See United States v. Apple Inc.*, 952 F.Supp.2d 638 (S.D.N.Y. 2013). Following a bench trial, the district court found Apple guilty of violating the antitrust laws, *id* at 709, a ruling which was upheld on appeal. *United States v. Apple Inc.*, 787 F.3d 131 (2d. Cir. 2015), *cert. denied*, 136 S.Ct. 1376 (2016).

Ultimately, the Department of Justice obtained a settlement from Apple that amounted to $566 million in consumer refunds and $50 million in attorneys' fees. *See* Memorandum in Support of Plaintiffs' Motion for Preliminary Approval of Settlement with Apple Inc., at 1, *In re Electronic Books Antitrust Litigation*, No. 11-02293-DLC (S.D.N.Y. July 16, 2014). According to the plaintiffs' expert economist in that case, Dr. Roger Noll, that amounted to more than double the total damages suffered by consumers. *Id.* n.4. And

importantly, those consumer refunds were distributed broadly, covering any "natural-person consumers who purchased qualifying E-books from any settling publisher from April 1, 2010, to May 21, 2012[.]" *Id.* at 7. That included not only Apple customers, but also Amazon customers, Barnes & Noble customers, and others who had no direct relationship with Apple. *See, e.g.*, Olivia Solon, *Free Credits in Your Amazon Account? Apple Pays up After Price-Fixing Suit*, THE GUARDIAN (June 21, 2016) (available online).

Respondents' case against Apple alleges monopolistic rather than collusive anticompetitive behavior, but aside from that, the similarities between this case and the eBook antitrust litigation are striking. Had Respondents filed their complaint with the Department of Justice, there would be no issues with standing or duplicative recovery and this complex, sprawling litigation would be in the hands of an agency with the expertise and resources necessary to handle it. This is the avenue for relief Respondents should have pursued, rather than a class-action suit under Section 4.

B. Role of the Federal Trade Commission

The Federal Trade Commission also plays a key role in antitrust. Section 5 of the Federal Trade Commission Act charges it with policing "unfair methods of competition," 15 U.S.C. § 45. This authority covers the existing prohibitions in the Sherman Act, as well as "other practices that harm competition, but that may not fit neatly into categories of conduct formally prohibited by the Sherman Act." *See* Fed. Trade Comm'n, *Guide to Antitrust Laws: The Antitrust Laws*

(available online) (last visited Aug. 15, 2018). This gives the Commission broader antitrust authority than the Department of Justice, enabling it to pursue cases that would not technically violate the Sherman Act, but which would likely harm consumers or competition if left unchecked.[3]

Like the Department of Justice, the Federal Trade Commission accepts and reviews public complaints over alleged anticompetitive conduct, *see* Fed. Trade Comm'n, *Report an Antitrust Violation* (available online) (last visited Aug. 15, 2018), and the Commission would have clear authority to pursue a monopolization complaint against Apple. Additionally, with its substantial experience in antitrust law and an entire bureau of economic expertise to draw upon, the Federal Trade Commission would be perfectly qualified to pursue a monopolization claim against Apple. Indeed, the Commission has a strong track record of bringing such cases and obtaining substantial redress for consumers.

For example, the Commission obtained over $32 million in consumer refunds from Apple and over $70 million in consumer refunds from Amazon, after both firms were found to have violated Section 5 by allowing unauthorized in-app purchases through their

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[3] There are also important limitations on the Commission's antitrust authority, including a lack of jurisdiction over certain firms, including common carriers, non-profits, and banks. *See* Fed. Trade Comm'n, *Guide to Antitrust Laws: The Enforcers* (available online) (last visited Aug. 15, 2018). However, none of those limitations are applicable here.

application stores. *See* Fed. Trade Comm'n, *Apple Inc. will Provide Full Consumer Refunds of at Least $32.5 Million to Settle FTC Complaint It Charged for Kids' In-App Purchases Without Parental Consent* (Jan. 15, 2014) (available online); Fed. Trade Comm'n, *Refunds Now Available from Amazon for Unauthorized In-App Purchases* (May 30, 2017) (available online).

And the Commission has obtained substantial injunctive relief from major technology companies, too. For example, to settle an investigation into allegedly monopolistic practices in how it licensed its microprocessor and semiconductor patents, chipmaker Intel agreed to modify its behavior to benefit both competitors and consumers. *See* Fed. Trade Comm'n, *In re Intel Corp.*, Decision and Order, Docket No. 9341 (Oct. 29, 2010) (available online).

Again, Respondents should have pursued this avenue for relief, rather than a class-action suit under Section 4.

C. Role of State Attorneys General

Finally, state attorneys general play another key role in antitrust. They regularly accept antitrust complaints from consumers like Pepper, *see, e.g.*, Commonwealth of Pa., Office of Attorney Gen., *Submit a Complaint: Antitrust Complaint* (last visited Aug. 15, 2018) (available online), and any state attorney general can sue as *parens patriae* on behalf of consumers in their state and obtain treble damages in relief. *See* Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, § 301, 90 Stat. 1394 (15 U.S.C. § 15c). Importantly, such relief expressly excludes any amount "which duplicates amounts which

have been awarded for the same injury," 15 U.S.C. § 15c(a)(1)(A), and also provides finality for the defendant by making any judgment obtained by a state attorney general "*res judicata* as to any claim under [Section 4] by any person on behalf of whom such action was brought and who fails to give such notice within the period specified in the notice given pursuant to paragraph (1) of this subsection." 15 U.S.C. § 15c(b)(3).

This form of action was clearly designed to handle cases like the current one against Apple in a way that Section 4 was not. The difficulties inherent in complex antitrust litigation are addressed through various limitations that protect defendants and the judicial system, while still providing effective remedies for plaintiffs.

And there is recent evidence to show that complaints like the one brought by Respondents against Apple could, and should, have been brought by a state attorney general acting as *parens patriae* on behalf of both iOS users and application developers. For example, Missouri Attorney General Josh Hawley is currently pursuing an antitrust suit against Google, owner of the Android mobile operating system that rivals Apple's iOS. *See, e.g.*, Wendy Davis, *Missouri AG Expands Antitrust Probe of Google*, MEDIAPOST DIGITALNEWSDAILY (July 25, 2018) (available online). State attorneys general were also instrumental to building the antitrust case against Microsoft in the late 1990s and enforcing the final judgment. *See, e.g.*, State of Ca., Dep't of Justice, Office of the Attorney Gen., *State Attorneys General to Coordinate*

Enforcement of Microsoft Antitrust Judgments; Offer Online Complaint Form at New Web Site (Sept. 11, 2003) (available online).

While some criticize the enforcement of federal antitrust laws by state attorneys general, *see, e.g.*, Richard A. Posner, *Federalism and the Enforcement of Antitrust Laws by State Attorneys General*, 2 GEO. J. L. & PUB. POL'Y 5, 8–12 (2004), they remain a viable source of relief for consumers like the Respondents. If neither the Department of Justice nor the Federal Trade Commission were able to provide the relief Respondents sought, they should have petitioned their state attorneys general rather than pursue a class-action suit under Section 4.

CONCLUSION

For the foregoing reasons, this Court should reverse the Court of Appeals.

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In the Supreme Court of the United States

APPLE INC., PETITIONER

v.

ROBERT PEPPER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Emilio E. Varanini, *Exiting the Fun House of Mirrors:* Clayworth v. Pfizer *and the Handling of Pass-on in Post-Trial Allocation Proceedings in Federal and State Court*, 20 Competition: J. Anti. & Unfair Comp. L. Sec. St. B. Cal. 28 (2011) 8, 20-21

INTEREST OF AMICI CURIAE

This brief is submitted by amici curiae the States of Texas, Iowa, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawai'i, Idaho, Illinois, Indiana, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Montana, Nebraska, New Mexico, New York, North Dakota, Pennsylvania, Rhode Island, South Carolina, South Dakota, and Virginia and the District of Columbia (which this brief counts as a "State" pursuant to the Clayton Act's definition of that term, 15 U.S.C. § 15g(2)).[1]

The States play an important role in antitrust enforcement. First, in their proprietary capacities, States can bring private damages actions pursuant to section 4 of the Clayton Act. *Georgia v. Evans*, 316 U.S. 159 (1942). In those cases, States are in the same position as other consumers who ultimately pay all or part of an illegal overcharge passed on by a distributor that purchased the goods directly from a price-fixer.

Second, Congress has assigned States a unique enforcement role under federal antitrust law. Pursuant to section 4C of the Clayton Act, States may bring *parens patriae* actions to recover damages for injury to their citizens from an antitrust violation. Section 4C's substantive reach has been held coextensive with that of a private damages action: "[Section 4C] simply created a new procedural device—*parens patriae* actions by States

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[1] No counsel for any party authored this brief in whole or in part, and no entity other than amici contributed monetarily to the preparation or submission of this brief. *See* Sup. Ct. R. 37.2.

on behalf of their citizens—to enforce existing rights of recovery under § 4." *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199, 219 (1990) (quotation marks omitted).

States are thus affected in both their proprietary and *parens patriae* capacities by *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), which adopted the legal fiction that illegal overcharges are never passed on to end users by intermediary parties who bought from an antitrust violator. Amici States urge the Court to reconsider and overturn that decision, which is grounded in predictions and policy concerns that have been undermined by subsequent experience and events.

Overturning *Illinois Brick* would result in affirming, on an alternative ground, the court of appeals' judgment reversing the district court's order dismissing under *Illinois Brick*. Although amici urge such a ruling for respondents in this Court, amici take no other position on the viability of respondents' claims, including on correct application of *Illinois Brick* were it to be maintained. This brief solely urges the Court to overrule *Illinois Brick*.

SUMMARY OF ARGUMENT

This case presents a rare opportunity to revisit the controversial holding in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). The Court can overrule its precedents based on briefing by amici, and it has done so before. The Court should do so again here.

I. Section 4 of the Clayton Act directs that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor ... and shall recover threefold the damages by him sustained." 15 U.S.C. § 15(a). It is

widely accepted that consumers can be injured when manufacturers take concerted action to fix supracompetitive prices and distributors of the overpriced products pass on some or all of the overcharges to end users.

Before 1977, when this Court decided *Illinois Brick*, lower courts generally allowed consumers who purchased goods made by an antitrust violator to prove that they had been harmed by overcharges passed on to them by intermediaries in the distribution chain. *Illinois Brick*, however, held that an "indirect purchaser" is categorically forbidden from attempting to prove damages from an antitrust violation. 431 U.S. at 726. Instead, "the overcharged direct purchaser should be deemed for purposes of section 4 to have suffered the full injury from the overcharge." *Id.*

The Court admitted that this conclusive presumption "denies recovery to those indirect purchasers who may have been actually injured by antitrust violations." *Id.* at 746. The Court did not identify any statutory text denying recovery to "any person who shall be injured," 15 U.S.C. § 15(a), by an antitrust violation. Instead, the Court reasoned that "the legislative purpose" of "encouraging vigorous private enforcement of the antitrust laws" was "better served" by a ban on "attempting to apportion the overcharge among all that may have absorbed a part of it." *Ill. Brick*, 431 U.S. at 745-46.

The Court relied on a policy concern that the extent of passing-on is "virtually unascertainable," making proof of that injury unreliable and burdensome to courts and to potential plaintiffs. *Id.* at 725 n.3. The Court also reasoned that a serious risk of duplicative liability for the same conduct justified allowing direct

purchasers to recover 100% of the violator's overcharges, even if passed on, and disallowing any recovery by indirect purchasers for their injury. Finally, the Court believed that allowing all victims to recover for their actual injuries (trebled, plus attorney's fees) would insufficiently encourage private suit, as compared to *Illinois Brick*'s rule allowing only a subset of victims to recover for a larger but presumed injury. *Id.* at 747 & n.31.

For those reasons, the Court barred judicial inquiry into whether any given indirect purchaser can prove its damages in a reasonably precise manner. *Id.* at 746. The Court recognized an exception, however, for when overcharges are passed on through one type of cost-plus contract that the Court viewed as avoiding a "virtually unascertainable," *id.* at 725 n.3, inquiry into elasticity of demand, *see id.* at 742-45.

II. *Illinois Brick* was controversial when decided. Since then, the States have overwhelmingly rejected, under state antitrust law, a limitation of damages actions to those who purchased directly from a violator. Instead, most state antitrust laws now follow the rule for torts generally, marking a violator's liability by foreseeability and proximate cause, not contractual privity.

As a result, state courts (and federal courts hearing state-law antitrust claims) now have decades of experience assessing proof that indirect-purchaser consumers were injured by illegal overcharges that distributors passed on from manufacturers. *Illinois Brick*'s predictions and policy judgments have not withstood that test of time.

First, an indirect purchaser's harm can no longer be categorically condemned as "virtually unascertainable." Since *Illinois Brick*, economists serving as experts in indirect-purchaser cases have reliably used previously unavailable tools and methodologies to assess that harm. The Court can no longer treat that harm as categorically unknowable with reasonable precision or as cost-prohibitive of indirect-purchaser claims.

Second, courts have shown themselves capable of applying gatekeeping rules of evidence to this type of expert analysis. The question whether expert proof of indirect-purchaser damages satisfies the gatekeeping rules of evidence is now routinely judged by state and federal courts, in the same way that courts apply those rules of evidence to proof of market definition and other complex issues in antitrust cases.

Third, *Illinois Brick* expressed concern that, without a bar against indirect-purchaser suits, defendants would face "a serious risk of multiple liability," i.e., liability to direct purchasers and indirect purchasers in separate lawsuits for the same overcharge (or same portion of an overcharge). *Id.* at 730-31. But subsequent decades of experience with state laws allowing indirect-purchaser suits show that the Court greatly overestimated that risk. Not a single instance of multiple liability has been reported in all that time, likely due to various practices, procedural rules, and limitations, some of which post-date *Illinois Brick*.

Fourth, *Illinois Brick* concluded that the deterrent purpose of private damages actions "is better served" by "elevating direct purchasers to a preferred position" and denying indirect purchasers the opportunity to sue.

Id. at 746. But experience has shown that, even then, direct purchasers can often be uniquely *disincentivized* to sue. And even if damages to indirect-purchaser consumers may be small, consumer claims are incentivized not only by Congress's authorization of treble damages and attorney's fees, but also by aggregation of those claims in state *parens patriae* actions.

III. The Court should overrule *Illinois Brick*. The doctrine of *stare decisis* may justify the Court's adherence to past decisions in many cases. But considerations relevant to application of *stare decisis* do not counsel continued adherence to *Illinois Brick*.

First, no significant reliance interests support retaining *Illinois Brick*. It is essentially a policy-based meta-rule of evidence, as opposed to a rule defining substantive property or contract rights.

Second, the Court has specifically recognized the importance of responding to evolving economic wisdom and experience in deciding whether to retain antitrust precedents. The Court is thus free to consider how intervening developments undercut *Illinois Brick*'s predictive and policy-based reasoning.

Third, *Illinois Brick*'s rule is increasingly difficult to apply in the modern world, with its growing commerce in intangible rights through new platforms. This case is a prime example.

Fourth, *Illinois Brick*'s reasoning is inconsistent with recent decisions on operative language like the Clayton Act's. *Illinois Brick* is also in tension with the congressional policy underlying section 4C of the Clayton Act, which authorizes States to bring *parens patriae* actions on behalf of their citizens.

Fifth, antitrust law has since developed a doctrine limiting liability under an independent test reflecting notions of foreseeability and proximate cause that align with modern tort law. That intervening development eliminates any policy concern with discarding *Illinois Brick*'s outdated privity test.

ARGUMENT

Many of the traditional justifications for overruling precedent apply to *Illinois Brick*. "Revisiting precedent is particularly appropriate where . . . a departure would not upset expectations, the precedent consists of a judge-made rule that was recently adopted to improve the operation of the courts, and experience has pointed up the precedent's shortcomings." *Pearson v. Callahan*, 555 U.S. 223, 233 (2009). That is the case here.

Illinois Brick is an atextual ruling based on a judicial perception of the reliability and burdensomeness of proving indirect-purchaser damages and of the resulting incentives for suit. Since 1977, the economic theory and methodology used to calculate antitrust damages have evolved considerably. And most States now authorize indirect-purchaser claims under state antitrust law. That has led to decades of judicial experience in indirect-purchaser cases with damages analyses, which can no longer be categorically condemned as unreliable or unadministrable. Likewise, the Court's policy concerns in *Illinois Brick* have been undermined by those decades of subsequent experience. And several other *stare decisis* factors justify overruling *Illinois Brick*, such as lack of significant reliance interests and difficulties in its application.

The Court has authority to reconsider precedent based on briefing by amici curiae. *E.g.*, *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 319-20 (1971). The Court also has authority to request briefing from the parties on reconsidering precedent. *E.g.*, *Patterson v. McLean Credit Union*, 485 U.S. 617, 617-18 (1988) (per curiam) (citing numerous such requests). The Court should take either course here and, ultimately, overrule *Illinois Brick*.

I. *Illinois Brick*'s bar on proving indirect-purchaser damages rests on predictions and policy judgments, not statutory text or lack of factual injury.

If manufacturers unlawfully conspire to fix prices of their goods, distributors who buy the goods directly from manufacturers may then pass on the overcharges by increasing the prices charged to consumers. Whether distributors pass on the full price increase, or instead reduce their sales volume and pass on only part of the increase, generally depends on elasticity of demand for the product. At least some pass-on can be expected in most instances. Emilio E. Varanini, *Exiting the Fun House of Mirrors:* Clayworth v. Pfizer *and the Handling of Pass-on in Post-Trial Allocation Proceedings in Federal and State Court*, 20 Competition: J. Anti. & Unfair Comp. L. Sec. St. B. Cal. 28, 52 (2011) ("The pass-on of at least some of the overcharges to end-users is direct, foreseeable, and even inevitable in almost every imaginable market situation as a matter of economics."). Indeed, this Court has assumed the pass-on of charges in other contexts. *See, e.g.*, *Gurley v. Rhoden*, 421 U.S. 200, 204-05 (1975) (establishing, for tax-

immunity purposes, a presumptive rule that taxes imposed on sellers are passed on to buyers).

If a distributor brings an antitrust suit against price-fixing manufacturers, it may attempt to show multiple types of damages. It may seek lost profits: profits that would have been earned but for sales lost due to its decision to increase consumer prices. Or a distributor may seek to recover the overcharges that it paid to manufacturers. In the latter situation, an accused manufacturer may allege that the distributor suffered no injury (or reduced injury) because it passed on all (or some) of the overcharges to consumers. That is a "defensive" passing-on allegation.

Consumers who are indirect purchasers of the price-fixers' goods may also sue and allege injury because the overcharges were passed on by distributors, increasing the retail price. That is an "offensive" passing-on allegation—made as part of the consumers' proof of injury from the anticompetitive conduct.

In 1968, this Court generally disallowed defensive passing-on allegations under federal antitrust law. *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968). The Court conceded that "there might be situations" in which a manufacturer could "prove that [a distributor] has not been damaged" because it passed on an overcharge. *Id.* at 494. But the claim that an overcharge was passed on to consumers in whole or in part was viewed as "difficult to determine." *Id.* at 493. The Court was concerned that the burdens of facing that defense would discourage private suits, frustrating the deterrent purpose of antitrust law. *Id.* at 493-94. Accordingly, the Court allowed the defense only where it

was "easy to prove" using "a pre-existing 'cost-plus' contract." *Id.* at 494.

In subsequent, offensive-use cases, lower courts relied on the deterrence-maximizing rationale of *Hanover Shoe* to let indirect purchasers offer proof that they were injured by illegal overcharges passed on by distributors. Edward D. Cavanagh, Illinois Brick: *A Look Back and a Look Ahead*, 17 Loy. Consumer L. Rev. 1, 8 (2004).

But *Illinois Brick* rejected that approach, reasoning that "the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers rather than by allowing every plaintiff potentially affected by the overcharge to sue." 431 U.S. at 735. The Court did not question that an indirect purchaser "may have been actually injured by antitrust violations." *Id.* at 746. Neither did the Court cite any statutory text limiting Congress's directive in 15 U.S.C. § 15(a) that "any person" who is financially injured by an antitrust violation may sue and "shall recover" damages.

Instead, *Illinois Brick* relied on policy concerns. First, the Court was concerned that determining the antitrust overcharge passed on to indirect purchasers would "inject[] extremely complex issues into the case." 431 U.S. at 745. The Court expressed concern with the reliability of that proof. *Id.* at 725 n.3 (suggesting that pass-on "cannot be measured" reliably and is "virtually unascertainable"); *id.* at 742 (doubting reliability even under "drastic simplifications"). And, given that prediction of complex proof, the Court also expressed concern with "the costs to the judicial system," *id.* at 732, and

with "reduc[ing] the incentive to sue" by "increas[ing] the overall costs of recovery," *id.* at 745.

Second, apart from problems of proof, the Court expressed concern over incentives for suit from the size of recovery. It expressed concern that allowing offensive proof "would create a serious risk of multiple liability for defendants." *Id.* at 730. And the Court determined that "the legislative purpose" of deterrence was "better served" by "elevating direct purchasers to a preferred position" among victims of unlawful overcharges. *Id.* at 746. Specifically, the Court found it more desirable to "concentrat[e] the full recovery for the overcharge in the direct purchasers." *Id.* at 735. If every victim could sue only for the portion of an overcharge that it absorbed (trebled, plus attorney's fees), the Court worried that many indirect purchasers would have an insufficient incentive to sue. *Id.* at 720, 746.

The Court acknowledged that, in section 4C of the Clayton Act, Congress had recently allowed the States to aggregate consumers' damages claims through *parens patriae* actions. *Id.* at 747 n.31 (discussing 15 U.S.C. § 15c, enacted in the Hart–Scott–Rodino Antitrust Improvements Act of 1976). The Court did not address that provision's positive effect on promoting *deterrence* through damages actions. *See id.* Instead, the Court simply noted that section 4C might not guarantee full *compensation* to indirect purchasers, as some might not come forward to secure their share of recoveries obtained by States. *Id.* at 747 n.31. The Court did not suggest that the goal of full compensation was better served by denying indirect purchasers any recovery mechanism at all. *See id.* And the Court subsequently con-

firmed that *Illinois Brick* has just that result of limiting *parens patriae* actions under section 4C to only claims of injury to direct purchasers. *Utilicorp*, 497 U.S. at 219.

II. States have since allowed indirect purchasers to sue under state antitrust law, leading to decades of experience that contradict the predictions and policy judgments underlying *Illinois Brick*.

Starting in 1978, many States responded to *Illinois Brick*'s controversial holding by legislatively or judicially disclaiming any direct-purchaser limitation on damages actions under state antitrust law. *See* Cavanagh, *supra*, at 2 n.4, 26-28. This Court declined to halt that trend in *California v. ARC America Corp.*, 490 U.S. 93 (1989), which rejected a preemption challenge to such laws. *Id.* at 105-06.

Today, a decisive majority of States—at least 35—permit damages suits by or on behalf of indirect purchasers. Antitrust Modernization Commission, Report and Recommendations 269 (2007) ("AMC Report"), govinfo.library.unt.edu/amc; *see also* Am. Bar. Ass'n, Indirect Purchaser Litigation Handbook 397-441 (2d ed. 2016). Thus, state courts (and federal courts hearing state-law antitrust claims) have accumulated four decades of experience assessing proof of injury to consumers who purchased price-fixed goods indirectly through distributors.

That experience warrants revisiting *Illinois Brick*. Proof of indirect purchasers' injury can no longer be categorically dismissed as unreliable, prohibitively complex, or beyond the capacity for judicial review.

That subsequent experience likewise undermines the policy concerns animating *Illinois Brick*.

A. Decades of experience applying modern economic analyses demonstrate that pass-on damages are not "virtually unascertainable."

An indirect purchaser's harm from price-fixing can no longer be categorically condemned as "virtually unascertainable." Since *Illinois Brick* was decided, previously unavailable tools and methodologies have allowed economists to assess indirect-purchaser damages with reasonable precision.

The Court in *Illinois Brick* was concerned that economic theory could not accurately model pass-on damages because of the difficulty of reconstructing the pricing decisions of intermediate purchasers at each step in the distribution chain. 431 U.S. at 731-32 & n.12. Calculating pass-on injury, the Court believed, would depend on "virtually unascertainable" elements such as other inputs in pricing decisions, the effect of higher prices on sales volume, and the effect of changes in output on marginal cost. *Id.* at 725 n.3.

Since 1977, the theory and methodology used to calculate antitrust damages have evolved substantially. As has now become clear, the demand and supply elasticities discussed in *Illinois Brick* are merely one way to compute passed-on overcharges. Indirect-purchaser damages are now often measured by the "yardstick" method or the "before-and-after" method, neither of which requires reconstructing a distributor's internal pricing decisions. Herbert Hovenkamp, *Book Review:* The Rationalization of Antitrust, 116 Harv. L. Rev. 917, 940-41 (2003). Instead, those methods look to the prevailing

price resulting from market forces unadulterated by cartel activity, or to pre- and post-cartel prices in the same market. *Id.*

Moreover, the volume and usability of available data have exploded since the 1970s. Distributors and other resellers often retain detailed sales data in a digitized format. Varanini, *supra*, at 53. That data allows economists to avoid speculation and control for potentially independent variables to show a reasonable probability that a given price increase to end users resulted from an anticompetitive overcharge by manufacturers. *Id.*; *see, e.g.*, Pierre Cremieux et al., *Proof of Common Impact in Antitrust Litigation: The Value of Regression Analysis*, 17 Geo. Mason L. Rev. 939, 945-46 (2010) (reviewing the econometric analysis used to control for non-collusive factors that may have affected consumer prices). *See generally* Pinelopi K. Goldberg & Michael M. Knetter, *Goods Prices and Exchange Rates: What Have We Learned?*, 35 J. Econ. Literature 1243 (1997) (describing how regression analysis is used to control for independent variables and calculate the "exchange rate passthrough" in international-trade cases).

Modern economic tools and methodologies also alleviate *Illinois Brick*'s concern about the burden on indirect purchasers in proving their injury. A revolution in data analysis has made it feasible for economists to perform analyses that would have been prohibitively expensive and difficult, if not impossible, in the 1970s. Roger Backhouse & Béatrice Cherrier, *"It's Computers Stupid!": The Spread of Computers and the Changing Roles of Theoretical and Applied Economics*, 49 History of Political Economy 103, 104 (Supp. 2017). *See gen-*

erally Charles Renfro, *Economic Software: The First Fifty Years in Perspective*, 29 J. of Econ. & Soc. Measurement 9, 72-73 (2004). Those are the same tools that enable experts to make reasonably precise estimates of prices and elasticities, using voluminous data, for purposes of other fundamental tasks in antitrust cases such as market definition. *See* Barak D. Richman & Christopher R. Murray, *Rebuilding* Illinois Brick*: A Functionalist Approach to the Indirect Purchaser Rule*, 81 S. Cal. L. Rev. 69, 75, 98-99 (2007); *see also* Phillip E. Areeda et al., Antitrust Law ¶ 346k (3d ed. 2007); Cavanagh, *supra*, at 24-25.

Those analyses are not so burdensome as to suppress indirect purchasers' incentive to bring private actions, especially considering the statutory provision for treble damages and attorney's fees. Since the mid-1990s, indirect purchasers have marshaled expert analyses of their damages and recovered billions of dollars in suits alleging anticompetitive conduct. *See* Robert H. Lande, *New Options for State Indirect Purchaser Legislation: Protecting the Real Victims of Antitrust Violations*, 61 Ala. L. Rev. 447, 448-49 & nn.11-12 (2010) (noting "eighty-four significant successful settlements of indirect purchaser cases" up through 2006). Many of those suits have, of course, produced significant competitive benefits for consumers. *Id.*

Those decades of experience allay *Illinois Brick*'s concern that burdens of proof will deter meritorious private actions by indirect purchasers. As this Court recognized in 1989, when discussing state laws allowing indirect purchasers to sue: "State laws to this effect are consistent with the broad purposes of the federal anti-

trust laws: deterring anticompetitive conduct and ensuring the compensation of victims of that conduct." *ARC Am.*, 490 U.S. at 102.

B. Courts have shown themselves capable of applying gatekeeping rules to proof of indirect-purchaser damages.

Allowing indirect purchasers to prove their damages has not cast courts beyond their competence, as *Illinois Brick* worried it might. Consumers' injury from passed-on overcharges by price-fixing manufacturers is capable of review under the rules governing proof of damages generally. *E.g.*, Fed. R. Evid. 702.

For instance, in *In re Static Random Access Memory (SRAM) Antitrust Litigation*, the plaintiff consumers alleged a price-fixing conspiracy among manufacturers who sold their products through various distribution channels. 264 F.R.D. 603, 606 (N.D. Cal. 2009). The indirect-purchaser plaintiffs sued under state antitrust law, offering expert testimony quantifying the anticompetitive overcharge initially paid by distributors that was passed on to consumers. *Id.* at 607, 613-15. The district court overruled an objection to that evidence under state expert-testimony rules, ruling that the evidence was based on reliable principles, applied to sufficient data, in a reliable manner. *Id.* at 616.

Similarly, in *In re Cathode Ray Tube (CRT) Antitrust Litigation*, the indirect purchasers' expert employed reliable economic methods for measuring the passed-on overcharge, identified the types of data required under each method, and demonstrated that the models had been used successfully in other cases. No.

3:07-cv-05944-JST, 2013 WL 5391159, at *4 (N.D. Cal. Sept. 24, 2013). In another case, the district court analyzed and denied a challenge to expert testimony that used regression models to determine a "cartel's impact on indirect purchasers." *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M:07-cv-1827, 2012 WL 555090, at *4 (N.D. Cal. Feb. 21, 2012).

As those examples show, courts are capable of judging proof of indirect-purchaser damages under the same gatekeeping evidentiary rules that govern proof of damages generally. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993) (holding that federal gatekeeping factors go beyond an older test focusing only on general acceptance). And, if expert testimony is unreliable in any given instance, federal courts can exclude it at trial or decline to rely on it for other purposes. *See, e.g., Somers v. Apple, Inc.*, 258 F.R.D. 354, 360 (N.D. Cal. 2009) (denying class certification where indirect purchasers' expert had "not yet developed a model or worked with any data in the context of the case."); *In re Methionine Antitrust Litig.*, 204 F.R.D. 161, 165 (N.D. Cal. 2001) (denying class certification where indirect purchasers' expert failed to identify any evidence supporting his proposed pass-on formula or advance a methodology to determine how resellers were injured).

C. The possibility of duplicative recovery for the same injury has not materialized.

Illinois Brick also rested on a policy judgment about deterrence and duplicative recovery. In that case, the United States as amicus curiae urged the Court to allow indirect purchasers to recover if they could prove injury, while retaining *Hanover Shoe*'s bar on reducing a

direct purchaser's damages based on pass-on allegations (unless indirect purchasers were already litigating pass-on in the same action). *Ill. Brick*, 431 U.S. at 730-31. That regime would promote the incentive for deterrent private actions. But it would theoretically risk recovery by multiple parties for the same injury if indirect purchasers presented their claims in actions separate from direct purchasers' actions and in a way preventing reconciliation of the claims. *Id.* at 730. *Illinois Brick* judged that risk too serious to allow. *Id.* So the Court concluded, based on *Hanover Shoe*'s bar on defensive use, that offensive use must also be barred. *Id.*

But, now, most States' antitrust laws allow indirect purchasers to sue over the same conduct actionable under federal law. So the decades since *Illinois Brick* have been fertile ground for testing the seriousness of the risk that multiple victims' competing claims cannot be reconciled and result in duplicative liability. Experience has revealed that risk to be profoundly less serious than *Illinois Brick* speculated.

For instance, the Antitrust Modernization Commission assembled by Congress reported that, despite ample testimony on numerous issues, "no one identified an instance of unfair or multiple recovery." AMC Report, *supra*, at 274. Academics observe that "there is not a single credible claim that any defendant was ever held to duplicative liability." Robert G. Harris & Lawrence A. Sullivan, *Passing on the Monopoly Overcharge: A Comprehensive Policy Analysis*, 128 U. Pa. L. Rev. 269, 346 (1979). *See generally, e.g.*, J. Thomas Prud'homme, Jr. & Ellen S. Cooper, *One More Challenge for the AMC: Repairing the Legacy of* Illinois Brick, 40 U.S.F.

L. Rev. 675, 684 (2006) ("[The multiple liability] justification has proven, in the almost thirty years since *Illinois Brick*, to be entirely hypothetical."). Amici States are also unaware of any such instance.

A host of safeguards allows reconciliation of competing claims. They include some longstanding limitations and aspects of federal procedure, such as:

- the four-year statute of limitations, 15 U.S.C. § 15b, which makes it unlikely that indirect purchasers could bring a suit only after a direct-purchaser lawsuit ends in a final award, as those lawsuits typically last years;
- the defense of laches, which similarly reduces that risk;
- limits on offensive collateral estoppel when a plaintiff could easily have joined in an earlier action, *see Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979);
- consolidation and transfer of cases, *see* 28 U.S.C. §§ 1404, 1407; Fed. R. Civ. P. 42(a);
- judicial authority to adjust class definitions in class actions, *see* 35A C.J.S. Federal Civil Procedure § 115;
- statutory interpleader, 28 U.S.C. § 1335; and
- judicial authority to use escrow and to delay judgment.

See Harris & Sullivan, *supra*, at 346 (concluding that the risk of unreconcilable duplicative claims "is one that judicial experience shows to be easily managed").[2]

Second, the Class Action Fairness Act of 2005 ("CAFA") greatly expanded federal jurisdiction over state-law class actions. *See* 28 U.S.C. §§ 1332(d), 1453, 1711-1715. Under CAFA, state-law indirect-purchaser claims that previously would have stayed in state courts are now frequently removed to and consolidated in federal court.

By guiding most indirect-purchaser litigation into federal court, where related actions in various districts can be consolidated for class certification and other pretrial proceedings, CAFA further diminishes the risk of multiple liability. *See* Varanini, *supra*, at 59-60; *see, e.g.*, *In re: Polyurethane Foam Antitrust Litig.*, 753 F. Supp. 2d 1376 (U.S. Jud. Pan. Mult. Lit. 2010) (ordering state-law indirect-purchaser claims to proceed in same federal court as federal-law direct-purchaser claims). That single federal court can unify decisions on the admissibility of damages evidence and the commonality of indirect-purchaser injury. *See generally* AMC Report, *supra*, at 274 (noting that "estimating pass on for a potential class can be a significant barrier to class certifi-

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[2] *Illinois Brick* was also concerned that allowing pass-on allegations and resolving competing claims of direct and indirect purchasers would add "whole new dimensions of complexity" from managing claims against a common fund. 431 U.S. at 737; *see id.* at 738-41. As explained above, however, the judiciary has proven adept at managing that complexity. Moreover, the complexity is already present in nearly all instances because the majority of States now permit indirect-purchaser suits.

cation"). And those consolidated actions often remain in the transferee court for trial because, after class certification, the transferee court can, "using a medley of options, retain jurisdiction over the case for trial purposes." Varanini, *supra*, at 59-60 & n.136.

Sufficient time has passed to conclude that the risk of unreconcilable damages claims by direct and indirect purchasers is not nearly as serious as *Illinois Brick* suggested. The Court should reconsider whether preventing any hypothetical risk of duplicative recovery—a risk that has not materialized in 40 years—justifies denying a remedy to actual victims who can prove their loss with reasonable precision.

D. *Illinois Brick*'s assumption that full compensation must be sacrificed to ensure robust deterrence has proved unfounded.

Lastly, *Illinois Brick* rested on a policy view that "the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers rather than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it." 431 U.S. at 735; *accord id.* at 745-47.

But the ensuing 40 years have shown that this rule results in denying a claim to consumers even when direct purchasers are unlikely to sue: "Recent scholarship has been more empirically grounded, and most results suggest that denying standing to indirect purchasers has severely hindered antitrust enforcement." Richman & Murray, *supra*, at 94.

Direct purchasers often have little desire to disrupt a lucrative relationship with antitrust-violating suppli-

ers, especially when direct purchasers can pass on most or all of an anticompetitive overcharge. Lande, *supra*, at 452-53; Hovenkamp, *supra*, at 941-42; Harris & Sullivan, *supra*, at 352. That concern cannot be dismissed as speculative. *See* Memorandum from the Antitrust Modernization Comm'n Staff to the Antitrust Modernization Comm'n Comm'rs 12-13 (May 4, 2006), govinfo.library.unt.edu/amc/pdf/meetings/CivRem-IndP_DiscMemo060504-fin.pdf (summarizing testimony identifying several instances in which direct purchasers failed to pursue claims that indirect purchasers pursued).

Indeed, the indirect-purchaser rule can perversely "encourage[] additional antitrust violations." Richman & Murray, *supra*, at 94-95. Upstream cartels can "manipulate the incentives" of distributors by "shar[ing] rents with [them] without explicitly including them in an illegal conspiracy." *Id.* at 94; *see* Maarten P. Schinkel et al., *Illinois Walls: How Barring Indirect Purchaser Suits Facilitates Collusion*, 39 RAND J. of Econ. 683, 683 (2008) (detailing mechanics); *id.* at 694-95 (surveying cases where this may have occurred).

Conversely, the past decades' experience shows that allowing injured consumers to sue enhances deterrence. Cavanagh, *supra*, at 49 ("Indirect purchaser suits have led to a modest up-tick in deterrence."). *Illinois Brick* was concerned that "diffusing the benefits" of a damages action "could seriously impair" the viability of private suits. 431 U.S. at 745. But even though the incentive may be divided up, ample incentive for meritorious claims is created by the statutory award of attorney's fees and mandatory treble damages. 15 U.S.C. § 15(a). And indirect-purchaser claims may be aggregated either

in appropriate class actions or by state *parens patriae* suits, *see id.* § 15c, mitigating collective-action difficulties.

Unsurprisingly, then, the past four decades have seen many successful indirect-purchaser suits under state antitrust laws. *See* Am. Bar Ass'n, Indirect Purchaser Litigation Handbook (2d ed. 2016); Am. Bar Ass'n, Indirect Purchaser Lawsuits (Eric J. McCarthy et al. eds., 2010).[3] Ultimately, as Professor Hovenkamp opines:

> Direct purchasers may be somewhat better detectors than are indirect purchasers or the consumer groups representing them, but there is no obvious reason for thinking they are so superior as to warrant exclusive rights to action based on a deterrence rationale. Much more plausibly, the likelihood of detection varies with the number of detectives. The indirect-purchaser rule weakens the incentives of consumers and their interest groups to detect violations, for it robs them of their damage action.

Herbert Hovenkamp, *The Indirect-Purchaser Rule and Cost-Plus Sales*, 103 Harv. L. Rev. 1717, 1729 (1990).

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[3] Even before *Illinois Brick*, indirect purchasers were plaintiffs in almost two-thirds of all private federal antitrust actions and the only plaintiffs in one quarter of those cases. S. Rep. No. 95-934, at 19-20 (1978).

III. The Court should overrule *Illinois Brick*.

Stare decisis "is not an inexorable command," and a number of factors inform the determination whether to overrule a past decision. *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2478-79 (2018) (quotation marks omitted). The considerations most relevant here are the strength of any reliance interests, subsequent experience, the decision's administrability, the quality and consistency with other decisions of the precedent's reasoning, and developments in the law since the decision was handed down. Those factors all favor overruling *Illinois Brick*.

A. No significant reliance interests justify retaining *Illinois Brick*.

In some cases, reliance provides a strong reason for adhering to past decisions. But it does not carry significant weight here. Although *stare decisis* is at its "acme" in property and contract cases that have engendered reliance, "the opposite is true in cases . . . involving procedural and evidentiary rules." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991).

Illinois Brick is in the latter camp. It rests heavily on evidentiary concerns about the reliability and burdensomeness of certain evidence of injury. There is no other way to explain *Illinois Brick*'s exception allowing suit for "easy to prove" indirect-purchaser injury under cost-plus contracts. 431 U.S. at 724 n.2, 732 n.12.

Because it is grounded in evidentiary concerns and enforcement policy, *Illinois Brick* has not engendered reliance interests of significance in the *stare decisis* analysis. *Payne*, 501 U.S. at 828. Moreover, antitrust

violators can have no serious expectation that they will not face claims by indirect purchasers, as most States now allow such claims. *See supra* pp. 12-13.

B. *Stare decisis* has weaker force when subsequent economic experience undermines the rationale of antitrust decisions.

The Court has a recognized willingness to reconsider policy-driven antitrust decisions "as economic understanding evolves." *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2412-13 (2015); *accord State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) ("In the area of antitrust law, there is a competing interest, well represented in this Court's decisions, in recognizing and adapting to changed circumstances and the lessons of accumulated experience."). Hence, the Court "has viewed *stare decisis* as having less-than-usual force in cases involving the Sherman Act." *Kimble*, 135 S. Ct. at 2412; *accord Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007).

And *stare decisis* already places importance on subsequent experience in deciding whether to retain precedent. *E.g.*, *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2092 (2018) (overruling a decision that had become "removed from economic reality"); *Pearson*, 555 U.S. at 233 (overruling a decision based on subsequent experience).

As set out above in Part II, *Illinois Brick*'s concerns with proof of indirect-purchaser injury are no longer justified given decades of experience under state antitrust law and modern economic techniques. *Stare deci-*

sis is no obstacle to reconsidering *Illinois Brick* based on those intervening developments.

C. *Illinois Brick* is increasingly difficult to apply in the modern world, as this case shows.

The Court routinely considers the "workability" of its precedent in considering the force of *stare decisis*. *Janus*, 138 S. Ct. at 2481-82; *e.g.*, *Wayfair*, 138 S. Ct. at 2097; *Payne*, 501 U.S. at 827. *Illinois Brick* has proved increasingly difficult to apply with the increase in commerce over modern platforms for licensing rights. That difficulty is shown not only by the disagreement between the district court and court of appeals here, but also by the divided opinions in *Campos v. Ticketmaster Corp.*, 140 F.3d 1166 (8th Cir. 1998).

In a traditional resale model, an intermediary buys goods from a manufacturer and resells them to purchasers, usually with branding or other value added. That was the case with the concrete bricks in *Illinois Brick*, which contractors bought and incorporated into buildings sold to users. 431 U.S. at 726.

In contrast, only some of those features are present with platforms such as Apple's App Store platform or Ticketmaster's platform in *Campos*. Unlike distributors of goods, those platforms merely facilitate the licensing of rights to consumers (i.e., a license to install an app on a device or to enter a performance venue). Consumers are the first parties in that mode of commerce to pay money to someone else. And if consumers pay that money to a platform accused of anticompetitive conduct, some rationales in *Hanover Shoe* suggest that those initial payers can sue under *Illinois Brick*. 392 U.S. at 490 ("A person whose property is diminished by a payment

of money wrongfully induced is injured in his property."); *id.* at 490 n.8 (indicating that liability is set at "the first step" of the initial payment to the wrongdoer). That appears to be the gist of the Ninth Circuit's "distributor function" test. Pet. App. 17a-21a.

On the other hand, *Campos* articulated an "antecedent transaction" test for such platforms, applying that test to preclude buyers who used Ticketmaster's platform from alleging injury due to Ticketmaster's practices. 140 F.3d at 1169-70. *Campos*, in turn, has drawn criticism for creating a situation in which no one has standing to sue, since concert venues lack injuries-in-fact and concertgoers are denied a right of action. *See, e.g.*, Joseph P. Bauer, *The Stealth Assault on Antitrust Enforcement: Raising the Barriers for Antitrust Injury and Standing*, 62 U. Pitt. L. Rev. 437, 447 (2001); Jill S. Kingsbury, *The Indirect Purchaser Doctrine: Antecedent Transaction?*, 65 Mo. L. Rev. 473, 490 (2000); *see also Campos*, 140 F.3d at 1174-75 (Arnold, J., dissenting).

This brief takes no position on whether *Campos* or the decision below correctly apply *Illinois Brick*. Those decisions do, however, highlight difficulties in applying *Illinois Brick* in the modern world. Other decisions also grapple with that task and reach a variety of inconsistent conclusions. *See, e.g.*, Areeda et al., *supra*, at ¶ 346j; Seth E. Miller, *Seeing Over the Brick Wall: Limiting the* Illinois Brick *Indirect Purchaser Rule and Looking at Antitrust Standing in* Campos v. Ticketmaster Corp. *Through a New Lens*, 32 Fla. St. U.L. Rev. 197, 212-16 (2004); Andrew I. Gavil, *Thinking Outside the* Illinois Brick *Box: A Proposal for Reform*, 76 Antitrust L.J.

167, 191 n.69 (2009); Roger D. Blair & Jeffrey L. Harrison, *Reexamining the Role of* Illinois Brick *in Modern Antitrust Standing Analysis*, 68 Geo. Wash. L. Rev. 1, 18-25 (1999). Those differing conclusions highlight that *Illinois Brick* is increasingly problematic to apply.[4]

D. *Illinois Brick* is not commended by the quality of its reasoning.

An important factor in deciding whether *stare decisis* compels continued adherence to precedent is "the quality of its reasoning." *Janus*, 138 S. Ct. at 2479; *accord Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 480-81 (1989). Here, *Illinois Brick*'s reasoning is out of step with both the text of the Clayton Act and congressional policy.

1. The Court has acknowledged that *Illinois Brick* circumscribes private actions based on "concerns" about "active enforcement." *Blue Shield of Va. v. McCready*, 457 U.S. 465, 474 (1982). But addressing those concerns

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[4] *Ohio v. American Express Co.*, 138 S. Ct. 2274 (2018) ("*AmEx*"), further complicates the issue. *AmEx* held it necessary to analyze anticompetitive effects with reference to "both sides of a two-sided transaction platform," defining such platforms to cover a business that "offers different products or services to two different groups who both depend on the platform to intermediate between them," as long as the business "cannot make a sale to one side of the platform without simultaneously making a sale to the other." *Id.* at 2280, 2287. *AmEx* thereby envisions a seller with *direct* connections to *two groups* of purchasers. If the App Store in this case falls within this definition—as Justice Breyer's dissent may suggest, *see id.* at 2299—then *AmEx* may mean that both app developers and app purchasers are "direct" purchasers from Apple.

(which are outdated, *see supra* Part II) came "at the expense of distorting the statutory language." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 136 (2014).

The statute contains no direct-purchaser limitation. Section 4 of the Clayton Act directs that "*any person* who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue ... and shall recover threefold the damages by him sustained." 15 U.S.C. § 15(a) (emphasis added). It is hard to think of language broader than "any person ... injured." *Id.*

The Court has repeatedly recognized the breadth of the word "any." *See, e.g.*, *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1354 (2018); *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1141 (2018); *Kasten v. Saint-Gobain Perf. Plastics Corp.*, 563 U.S. 1, 10 (2011); *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 218-19 (2008). The Court has even made that point in the context of competition law. *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 236 (1948) (discussing a provision authorizing "any" victim to sue: "The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices...."); *cf. Janus*, 138 S. Ct. at 2478 (analyzing, in weighing *stare decisis*, a past decision's "consistency with other related decisions").

The term "any" therefore indicates that all injured consumers have a right to pursue monetary relief, not just consumers who bought from a price-fixer directly. *Cf. Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) ("When the statutory language

is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.") (quotation marks omitted).

Moreover, the Clayton Act authorizes lawsuits "without respect to the amount in controversy," 15 U.S.C. § 15(a), confirming the atextual nature of *Illinois Brick*'s concern with the predicted "small stake[s]" of indirect-purchaser suits, 431 U.S. at 747.[5]

Of course, Congress intended the Clayton and Sherman Acts "to be construed in the light of [their] common-law background," which includes limitations such as proximate cause. *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 531-33 (1983) ("*AGC*"). But there is no common-law (or textual) basis for excluding all indirect purchasers who are injured by reason of an antitrust violation. And *Illinois Brick* admits that its rule "denies recovery to those indirect purchasers who may have been actually injured by antitrust violations." 431 U.S. at 746.

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[5] The legislative history confirms that the Congress that enacted the damages remedy, originally section 7 of the Sherman Act of 1890, envisioned relief for actual users, not simply middlemen. The 51st Congress recognized that individual consumers were primarily injured by the great trusts of the day, even though they did not purchase goods such as sugar directly from those trusts. For example, Senator George included consumers in explaining who could recover damages: "The consumer, therefore, paying all [of a trust's] increased price advanced by the middlemen and profits on the same, is the party necessarily damnified or injured." 21 Cong. Rec. 1767 (1890). Senator Spooner similarly expressed his concern with trusts' "keep[ing] up to consumers" the prices of various foods. 21 Cong. Rec. 2640 (1890).

Furthermore, section 4 directs that any person injured by an antitrust "shall recover" his damages sustained. 15 U.S.C. § 15(a). As the Court recently confirmed, "shall" connotes a mandatory duty, not admitting of policy-laden exceptions. *SAS Inst.*, 138 S. Ct. at 1354 ("The word 'shall' generally imposes a nondiscretionary duty.").

2. The Court has also found it appropriate to overrule precedent where doing so would "correct a seriously erroneous interpretation of statutory language that would undermine congressional policy as expressed in other legislation." *Rodriguez de Quijas*, 490 U.S. at 484. That consideration also counsels overruling *Illinois Brick*.

In the Hart–Scott–Rodino Antitrust Improvements Act of 1976, Congress enacted section 4C of the Clayton Act, which provides that a State may bring a civil action in its name, "as parens patriae on behalf of natural persons residing in such State," to secure monetary relief "for injury sustained by such natural persons to their property by reason of any violation of [the Sherman Act]." 15 U.S.C. § 15c(a)(1). As this Court has held, section 4C is a procedural device to permit aggregation of claims that citizens could themselves bring under section 4 of the Clayton Act. *Utilicorp*, 497 U.S. at 219.

But that aggregation would have little point if, as *Illinois Brick* concluded, section 4 claims are limited to only direct purchasers. The States would have been given a practically useless power, because citizens who buy price-fixers' goods rarely do so directly, as opposed

to buying indirectly through distributors.[6] That conflict between *Illinois Brick*'s indirect-purchaser limitation and the policy embodied in the Hart–Scott–Rodino Antitrust Improvements Act further justifies overruling *Illinois Brick*.

3. More generally, the Court has recognized compensating injured parties as a major goal of antitrust law. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 n.10 (1977) (recognizing the congressional design to "[open] the door of justice to every man, whenever he may be injured by those who violate the antitrust laws, and [to] giv[e] the injured party ample damages for the wrong suffered"). That congressional policy is inconsistent with *Illinois Brick*'s decision to bar recovery by indirect purchasers who can prove their injury with reasonable precision—and to instead allow potential windfall awards to direct purchasers who may not bear any of an illegal overcharge. *See* AMC Report, *supra*, at vi ("Such a system that compensates the uninjured and denies recovery to the injured seems fundamentally unfair.").

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[6] That structural implication of section 4C is confirmed by the provision's legislative history. The Senate Report explains that, "[a]s between competing claimants within the chain of distribution, however, *including consumers*, [section 4C] is intended to assure that the monetary relief is properly allocated." S. Rep. No. 94-803, at 44-45 (1976) (emphasis added). Likewise, the House Report states Congress's understanding that, "Under section 4 of the Clayton Act, any person, including *any consumer*, who can prove he was injured by price-fixing or any other antitrust violation, has a cause of action." H.R. Rep. No. 94-499, at 6 (1976) (emphasis added).

State attorneys general, through section 4C actions, are uniquely situated to achieve Congress's expressed purpose of compensating injured parties. Unlike federal antitrust enforcers, state attorneys general can recover damages for consumers and local-government purchasers. AMC Report, *supra*, at 186. And the States' authority to bring *parens patriae* actions on behalf of their citizens stems in part from their sovereignty. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 600 (1982). That point further justifies departing from *Illinois Brick*'s incorrect limitation of that authority. *See Wayfair*, 138 S. Ct. at 2097 (departing from *stare decisis* where incorrect precedent "is limiting the lawful prerogatives of the States").

E. Overruling *Illinois Brick* will align antitrust law with modern concepts of remoteness.

Finally, revisiting precedent is supported when it is "undesirable for" the Court's precedent "to exist side by side" with contrary treatment of similar issues. *Rodriguez de Quijas*, 490 U.S. at 484. And *Illinois Brick*'s outdated limitation of liability according to privity is anomalous.

"[C]ourts generally have acknowledged that treble-damages actions under the antitrust laws are analogous to common-law actions sounding in tort," *Tex. Indus., Inc. v. Radcliffe Materials, Inc.*, 451 U.S. 630, 634 (1981), and the Court has referenced rules for "tortfeasors" to set the "rule in antitrust litigation." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 343-47 (1971); *id.* at 347 (dispensing with "the ancient common-law rule" and adopting the Second Restatement of

Torts rule). That analogy to tort law supports dispensing with *Illinois Brick*'s direct-purchaser limitation because privity of contract with the wrongdoer is generally not required to recover damages for the consequences of torts. Restatement (Second) of Torts §§ 402A(2)(b), 774A & cmt. b (1965) (as amended). Rather, tortfeasors' liability is generally limited by foreseeability and proximate cause. *Id.* §§ 430, 435-439; *accord* Restatement (Third) of Torts: Physical & Emotional Harm § 29 (2010).

In fact, those modern tort limitations now find expression in a separate antitrust doctrine developed after *Illinois Brick*. In 1983, the Court announced the "remoteness" test for federal antitrust standing. *AGC*, 459 U.S. at 537-44. That test balances five factors: (1) the causal connection between the antitrust violation and the plaintiff's harm; (2) the nature of the injury, including whether the plaintiff is a consumer or competitor in the relevant market; (3) the directness of the injury, and whether the damages are too speculative; (4) the potential for duplicative recovery, and whether the apportionment of damages would be too complex; and (5) the existence of more direct victims with motivation to sue. *Id.*

When state antitrust law allows indirect purchasers to sue, applying *AGC*'s multifactor test guards against liability to far-removed parties in a much more principled way than *Illinois Brick*'s categorical prohibition. Although a court may ultimately deny standing to certain plaintiffs, it does so only after analyzing their relationship to the alleged wrong. *See, e.g.*, *Supreme Auto Transp. LLC v. Arcelor Mittal*, No. 1:08-cv-05468, 2017

WL 839484 (N.D. Ill. Mar. 3, 2017); *In re Refrigerant Compressors Antitrust Litig.*, No. 2:09-md-02042, 2013 WL 1431756 (E.D. Mich. Apr. 9, 2013). Although *AGC*'s barrier is high, it is not categorically insurmountable by indirect-purchaser plaintiffs. *See, e.g.*, *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 586 F. Supp. 2d 1109, 1123-24 (N.D. Cal. 2008); *In re Flash Memory Antitrust Litig.*, 643 F. Supp. 2d 1133 (N.D. Cal. 2009); *In re Intel Corp. Microprocessor Antitrust Litig.*, 496 F. Supp. 2d 404 (D. Del. 2007). Eliminating *Illinois Brick*'s blunt-edged test would align antitrust law with modern tort concepts, which find expression in the reticulated *AGC* test.

CONCLUSION

The Court should reconsider and overrule *Illinois Brick*'s indirect-purchaser rule.

Respectfully submitted.

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IN THE

Supreme Court of the United States

IN RE APPLE IPHONE ANTITRUST LITIGATION

APPLE, INC.,

Petitioner,

v.

ROBERT PEPPER, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INTEREST OF *AMICUS CURIAE*[1]

Verizon Communications Inc., through its subsidiaries, (collectively, "Verizon") is a global leader in delivering innovative communications and technology solutions to consumer, business, government, and wholesale customers and provides integrated business solutions to customers in more than 150 countries.

Verizon regularly appears before the Court, both as a party and as an *amicus curiae*, including in cases involving antitrust law issues. *See, e.g.*, *Ohio v. American Express Co.*, No. 16-1454 (2018) ("*Amex*"); *Pac. Bell Tel. Co. v. LinkLine Communications, Inc.*, No. 07-512 (2009); *Bell Atlantic Corp.* v. *Twombly*, No. 05-1126 (2007); *Verizon Communications Inc. v. Law Offices of Curtis v. Trinko, LLP*, No. 02-682 (2004); *NYNEX Corp. v. Discon, Inc.*, No. 96-1570 (1998).

Verizon is a direct and indirect purchaser of goods and services; it also sells good and services to direct purchasers, who in turn sell to indirect purchasers. In addition, Verizon distributes its services through agency relationships. And finally, Verizon participates in two-sided markets (and more complex multi-sided markets) both as a provider of connective platforms and as a market participant relying on a platform for connection.

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1. Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus curiae* or its counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief.

In these endeavors, Verizon businesses rely both on "transaction platforms" as the Court defined the term in *Amex*, such as the credit card payment systems in Verizon-owned stores, and non-transaction platforms, such as newspaper advertising. In addition, Verizon businesses rely on a host of other platforms that may fall into these categories or other yet-to-be-defined categories, such as cloud computing, customer relationship management platforms, operating systems, and healthcare systems.

Verizon is also a platform provider itself. ThingSpace is Verizon's web-based Internet of Things ("IoT") platform that provides a workspace for developers to create applications and services for customers with connected IoT devices that are served by Verizon's network. BrightRoll by Yahoo! provides programmatic tools to help buyers and sellers of digital advertising space connect with each other, and ONE by AOL provides a mobile monetization platform that enables publishers, advertisers, and consumers to connect with each other. In short, platforms support Verizon's business, and in many instances, they are Verizon's business.

Verizon thus has a strong interest in the proper application of the antitrust laws and the Court's antitrust jurisprudence and, most relevant here, a heightened interest in how the Court applies those laws and precedents to these complex and developing markets.

Verizon expresses no opinion on the merits of this case. Rather, Verizon writes here to explain how the Court's treatment of two-sided platforms in *Amex* bears on this case and raises novel and important questions regarding how *Illinois Brick Co. v. Illinois*, 431 U.S. 720

(1977), should be applied in the context of two- or multi-sided platforms.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Amex represented the Court's first foray into the developing field of two-sided platforms and its application to antitrust law. *See* Dirk Auer & Nicolas Petit, *Two-Sided Markets and the Challenge of Turning Economic Theory into Antitrust Policy*, 60 Antitrust Bulletin 426 (2015) ("Auer & Petit") (describing "this novel field of academic work"). *Amex* presented the question whether to analyze two-sided platforms as one or two separate markets for the purposes of defining the relevant market.

Perhaps given the uncertainty in the economic theory and legal analysis of two-sided platforms, the Court ventured cautiously into this arena. Rather than attempt to rule broadly on the market-definition issue before it, the Court outlined its general conception of two-sided platforms and held only that, for a particular kind of platform—"transactional" platforms—both sides of the platform should be treated as one market. *Amex* slip op. at 12-13. As explained further below, the *Amex* decision, though narrow, has important implications for the application of *Illinois Brick* to two- or multi-sided platforms. Moreover, *Amex*'s potential application to this case serves as a useful reminder as the Court continues to formulate its approach to two- (and multi-) sided markets that each decision—even if limited—may bear on the next, in sometimes unexpected ways.

Verizon takes no position on the *Illinois Brick* question presented. Verizon writes to discuss how *Amex*

impacts this case and to raise broader questions about the application of antitrust law to two-sided platforms.

BACKGROUND

Respondents (the plaintiffs below) are iPhone users who purchased apps through the App Store. Pet. App. 46a. Their class-action complaint alleges that Petitioner violated the Sherman Act by monopolizing the distribution of iPhone apps and charging supracompetitive prices by imposing a 30% commission on the purchase of apps. Respondents seek treble damages under Section 4 of the Clayton Act. Pet. App. 53a.

The district court dismissed Respondents' action, holding that they lack standing under *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), which generally bars indirect purchasers from maintaining Section 4 treble-damages claims. *See In re Apple iPhone Antitrust Litig.*, 2013 WL 6253147, at *6 (N.D. Cal. Dec. 2, 2013).

The Ninth Circuit reversed, crafting an exception to *Illinois Brick* where the defendant who passes on the overcharge operates as the distributor of the goods sold to the plaintiff. *See In re Apple iPhone Antitrust Litig.*, 846 F. 3d 313 (9th Cir. 2017). The Ninth Circuit made clear that its analysis turned entirely on the fact that Apple is the distributor of apps from its App Store: "Because Apple is a distributor, [Respondents] have standing under *Illinois Brick*." *Id.* at 324. The Court granted certiorari to answer the question "[w]hether consumers may sue for antitrust damages anyone who delivers goods to them, even where they seek damages based on prices set by third parties who would be the immediate victims of the alleged offense." Pet. at i.

ARGUMENT

The Court's recent decision in *Amex* suggests that Petitioner's App Store is a transaction platform. This means that there are purchasers on both sides of the platform. And as *Amex* makes clear, these purchasers—app developers and iPhone users—are best understood as purchasing the same item—transactions. In other words, the App Store appears to be a transaction platform with direct purchasers on both sides.

But that is really the beginning—not the end—of the analysis. As explained below, there are novel and important questions regarding how to apply *Illinois Brick* to two-sided platforms. Careful judicial guidance on those questions is needed for participants in these dynamic and rapidly changing markets.

A. The App Store Appears To Be A Two-Sided Transaction Platform Under *Amex*.

Amex was the first instance in which the Court expressly considered two-sided platforms and discussed how they differ from traditional markets. Although the Court did not purport to set out a comprehensive definition of two-sided platforms, it did identify some key characteristics thereof. As the Court explained, "a two-sided platform offers different products or services to two different groups who both depend on the platform to intermediate between them." *Amex* slip op. at 2 (citing Evans & Schmalensee, *Markets With Two-Sided Platforms*, 1 Issues in Competition L. & Pol'y 667 (2008); Evans & Noel, *Defining Antitrust Markets When Firms Operate Two-Sided Platforms*, 2005 Colum. Bus. L. Rev.

667, 668; Filistrucchi, Geradin, Van Damme, & Affeldt, *Market Definition in Two-Sided Markets: Theory and Practice*, 10 J. Competition L. & Econ. 293, 296 (2014)).

The Court explained that "[t]wo-sided platforms differ from traditional markets in important ways." *Amex* slip op. at 3. The key feature, the Court explained, is that "two-sided platforms often exhibit what economists call 'indirect network effects'"—which exist where "the value of the services that a two-sided platform provides increases as the number of participants on both sides of the platform increases." *Id.* Because of this interdependence, "two-sided platforms must be sensitive to the prices that they charge each side." *Id.*; *see also id.* ("Raising the price on side A risks losing participation on that side, which decreases the value of the platform to side B. If participants on side B leave due to this loss in value, then the platform has even less value to side A—risking a feedback loop of declining demand.").

The Court also recognized a "special type" of two-sided platform in which a platform "cannot make a sale to one side of the platform without simultaneously making a sale to the other." *Id.* at 2. In other words, these "transaction" platforms "facilitate a single, simultaneous transaction between participants." *Id.* at 13. The Court illustrated the point in the credit card market:

> the network can sell its services only if a merchant and cardholder both simultaneously choose to use the network. Thus, whenever a credit-card network sells one transaction's worth of card-acceptance services to a merchant it also must sell one transaction's worth of card-

> payment services to a cardholder. It cannot sell transaction services to either cardholders or merchants individually.

Id.

Importantly, the Court made clear that the item being sold is the same to both sides; it is the *transaction itself*. *Amex* slip op. at 13 ("Transaction platforms are thus better understood as 'suppl[ying] only one product'—transactions.") (quoting Klein, Lerner, Murphy, & Plache, *Competition in Two-Sided Markets: The Antitrust Economics of Payment Card Interchange Fees*, 73 Antitrust L. J. 571, 580 (2006)); *see also id.* at 14 n.8 ("'[C]redit-card companies are best understood as supplying only one product—transactions—which is jointly consumed by a cardholder and a merchant.").

In short, *Amex* generally conceives of two-sided platforms as those platforms that (1) offer "different products or services to two different groups who both depend on the platform to intermediate between them" and (2) exhibit interdependent "indirect network effects." *Id.* at 2, 3. *Amex* further conceives of transaction platforms as a subset of two-sided platforms having a third key characteristic; they "facilitate a single, simultaneous transaction between participants." *Id.* at 13.

Petitioner's App Store appears to fall within *Amex*'s conception of a transaction platform. First, the App Store is a platform where app developers sell apps capable of working on Apple's operating system and where iPhone users obtain those same apps. Pet. at 6 (citing Pet. App. 49a, 51a). In other words, the App Store is a platform that

offers "different products or services to two different groups who both depend on the platform to intermediate between them." *Amex* slip op. at 2.

Second, the two sides of the App Store exhibit an interdependence of indirect network effects. Perhaps the best depiction of this dynamic is the recently published 2008 interview with then-Apple CEO Steve Jobs, shortly after the launch of the App Store. *See 'The Mobile Industry's Never Seen Anything Like This': An Interview With Steve Jobs at the App Store's Launch*, Wall St. J. (July 25, 2018). In that interview, Mr. Jobs explained that as more developers launched new apps for the new App Store, *see id.* ("50 new apps a day coming in"), more iPhone users began downloading more of those apps, *see id.* ("Users have downloaded over 60 million apps from the App Store in the first 30 days."), thereby rapidly boosting the value of the App Store to both groups, *see id.* ("This doesn't happen very often. A whole new billion dollar market opens up. 360 million in the first 30 days, I've never seen anything like this in my career for software."); *see also id.* ("There's never been a mobile platform that's been this powerful before."); *see also* Pet. at 7 (noting that "iOS app developers earn[ed] over $20 billion in 2016 alone").

The App Store thus appears to exhibit the two key characteristics of a two-sided platform. And it also appears to exhibit the defining feature of a transaction platform because the App Store "cannot make a sale to one side of the platform without simultaneously making a sale to the other." *Amex* slip op. at 2. It "facilitate[s] a single, simultaneous transaction between" app developers and iPhone users. *Id.* at 13.

B. There Are Novel And Important Questions In The Wake Of *Amex* About How *Illinois Brick* Should Apply To Two-Sided Transaction Platforms.

As explained above, the App Store appears to be a transaction platform under *Amex*. There are purchasers on both sides of this transaction platform. *See* David Evans & Richard Schmalensee, *The Antitrust Analysis of Multisided Platform Businesses*, *in* 1 The Oxford Handbook of International Antitrust Economics 404, 425-26 (Roger D. Blair & D. Daniel Sokol eds., 2014) ("Evans & Schmalensee"). And as *Amex* makes clear, these purchasers—app developers and iPhone users—are best understood as purchasing the same item: transactions. *See supra* 7-8; *see also* Evans & Schmalensee, at 420 ("The fundamental service provided by multisided platforms is the ability of economic agents on each side to interact in a valuable way with economic agents on other sides."). That much seems apparent from *Amex*. But what does that mean for the application of *Illinois Brick*?

If the relevant market includes both sides of a two-sided transaction platform, does that mean each is a direct purchaser of the platform? Does the simultaneity of a single transaction, *see Amex* slip op. at 13, affect whether treble damage claims by iPhone users challenging those commissions are barred by *Illinois Brick*? Are direct purchasers of a two-sided transaction platform limited to suing only for antitrust violations related to the transactions? If both sides are deemed direct purchasers, how might that impact potential class certification in a transaction platform case? Must the class include the purchasers on both sides? Or does it matter that Petitioner imposes a fixed-percentage fee to only one side of App

Store transactions? Does Petitioner's agency relationship with app developers mean that its App Store is not a two-sided transaction platform under *Amex* because Petitioner has direct purchasers on only one side of the platform?

Indeed, it is unclear whether the way Petitioner has structured its App Store via contractual arrangement might change the way the law views the market dynamics here more generally. Economic analysis of two-sided platforms suggests that both the structure of the arrangement and the conduct of the platform can morph a two-sided platform into a conventional market. *See* Michael Katz & Jonathan Sallet, ***Multisided Platforms and Antitrust Enforcement***, 127 Yale L.J. 2142, 2150 (2018) ("[W]hether a firm constitutes a multisided platform may depend on its conduct.") Auer & Petit, at 434 ("Clauses introduced in the distribution contract between a supplier and a supermarket may thus turn a two-sided market in a one-sided market.").

Although antitrust law is informed by and often imports economic principles and analysis, statutory interests and other concerns sometimes drive the adoption of judicial rules in this arena. *See, e.g.*, *Illinois Brick*, 431 U.S. at 740-42. But if iPhone users are not direct purchasers under *Illinois Brick* because of Petitioner's contractual arrangements, then would it not make sense that those same contractual arrangements might require looking at only one side of the App Store when making a determination of market definition? Relatedly, if Petitioner is not setting prices here, does that mean that the App Store platform is not operating as a two-sided platform as conceived by the Court in *Amex*? *See Amex* slip op. at 3 ("[T]wo-sided platforms must be sensitive *to the prices that they charge each side.*") (emphasis added).

Of course, these questions are not all before the Court in this case. But they underscore the complexity of the judicial task when addressing the application of antitrust law to two-sided platforms and show why courts should consider the potential broader implications of each narrow question that comes before them in the context of a particular two-sided platform.

C. Careful Judicial Guidance Is Needed On These Issues.

Guidance is needed on these complex questions, especially as two-sided platforms expand and grow in "economic importance." Evans & Schmalensee, at 440. Given the developing nature of economic theory in this novel, complex arena, *see supra* 5-6, courts should of course proceed with caution, *see, e.g.*, *Verizon Communications Inc. v. Law Offices of Curtis v. Trinko*, 540 U.S. 398, 414 (2004) (noting the need for caution in a "highly technical" industry that is characterized by "incessant, complex, and constantly changing interaction[s]" among market participants); Jonathan B. Baker, *Taking the Error Out of "Error Cost" Analysis: What's Wrong with Antitrust's Right*, 80 Antitrust L.J. 1, 5 (2015). When forced to grapple with these novel questions, courts should consider the developing scholarly authority and engage with the complexities of two-sided platforms rather than simply reverting to existing precedent, which may not apply appropriately to two-sided platforms. *See* Auer & Petit, at 457 (warning against applying "existing legal tests mechanically to two-sided markets").

CONCLUSION

Amicus curiae respectfully requests that the Court take a measured approach (as it did in *Amex*) in articulating how antitrust law principles apply to two-sided markets and the implications of those principles for the *Illinois Brick* doctrine.

Respectfully submitted,

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No. 17-204

IN THE

Supreme Court of the United States

APPLE INC.,

Petitioner,

v.

ROBERT PEPPER, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether consumers may seek treble damages under § 4 of the Clayton Act from anyone who delivers goods to them, even if they seek damages based on prices set by third parties who would be the immediate victims of any alleged antitrust offense.

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INTEREST OF *AMICUS CURIAE*[1]

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters in all 50 states. WLF promotes and defends free enterprise, individual rights, limited government, and the rule of law. Since its founding in 1977, WLF has often appeared as an *amicus curiae* in important antitrust cases. *See, e.g.*, *FTC v. Actavis*, 570 U.S. 136 (2013); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199 (1990).

The central aim of antitrust law is to ensure free-market competition, providing consumers with better goods and services at lower prices. WLF believes that the decision below erodes, rather than furthers, that vital aim. By holding that the plaintiffs may seek damages under § 4 of the Clayton Act simply because Apple "functions" as a "distributor," the Ninth Circuit has paved the way for both direct and indirect purchasers to recover treble damages for the same alleged antitrust violation.

That potential for double recovery upends the business community's long and reasonable reliance on *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), which holds that only the direct purchaser of a good or service may sue an allegedly abusive monopolist for damages. If affirmed, the Ninth Circuit's holding

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[1] No party's counsel authored any part of this brief. No person or entity, other than WLF and its counsel, helped pay for the preparation or submission of this brief. All parties have consented to the filing of WLF's brief.

will unduly complicate federal antitrust litigation by requiring courts to undertake the famously difficult task of calculating "pass-on" antitrust damages. Not only would that result flout this Court's direct-purchaser rule, but it would drastically increase firms' exposure to duplicative antitrust suits and recoveries.

STATEMENT OF THE CASE

After introducing its popular iPhone in 2007, Apple launched the App Store in 2008. Pet. App. 2a. The App Store is a digital marketplace that allows iPhone users to download software applications, or "apps," for use on the iPhone. *Ibid.* Apple's patented iPhone operating system, iOS, allows users to download apps only from the App Store. *Id.* at 49a.

Independent software developers create most of the App Store's apps. Pet. App. 2a. These third-party developers have released more than two million apps for the iPhone. Br. of Pet'r 9. An app's developer sets the app's price, if any; most apps are free. Pet. App. 2a. Besides hosting the App Store, Apple also reviews apps for security and compatibility and—as the app developer's agent—collects any purchase price from the buyer and then delivers the app. *Ibid.* Apple charges the developer a 30% commission on each app sold; free apps yield no commission. *Id.* at 3a. When a user buys an app from the App Store, Apple retains its 30% commission from the sale price and remits the balance to the developer. *Ibid.*

The plaintiffs are iPhone users who bought apps through the App Store. Pet. App. 46a. In a

putative class action, they allege that Apple violated § 2 of the Sherman Act by abusing a monopoly on the "aftermarket" for iPhone apps. *Id.* at 3a. They also allege that Apple's supracompetitive 30% commission caused them to pay more for their iPhone apps than they should have paid. *Id.* at 53a. Under § 4 of the Clayton Act, the plaintiffs seek to recover treble the amount of every alleged overcharge. *Id.* at 63a.

On Apple's motion, the district court dismissed the operative complaint, with prejudice, for the plaintiffs' lack of direct-purchaser standing. Pet. App. 23a-37a. The court "fairly read" the complaint as challenging a "fee created by agreement and borne by the developers to pay Apple 30% from their own proceeds—an amount which is passed on to the consumers as part of their purchase price." *Id.* at 36a. Since the plaintiffs allege no facts suggesting that they purchased apps directly from Apple, the district court found their § 4 claim barred under *Illinois Brick*'s direct-purchaser rule. *Id.* at 36a-37a.

The Ninth Circuit reversed. Pet. App. 1a-22a. Departing from *Illinois Brick*'s analysis, the appeals court found it immaterial that Apple, acting as an agent, "forwards the payment" from iPhone users "to the app developers." *Id.* at 20a. Equally irrelevant was that the app developer "sets [the] price" for its apps. *Id.* at 21a. The panel thus failed to consider whether the plaintiffs' § 4 claim rests on the very pass-on theory of antitrust liability that *Illinois Brick* forecloses.

The Ninth Circuit also ignored that, as direct purchasers of the App Store's distribution services, tens of thousands of third-party app developers would have standing to assert their own § 4 claims against Apple for the same alleged violation. Pet. App. 20a. But according to the panel, "whether app developers are direct purchasers of distribution services from Apple in the sense of *Illinois Brick* makes no difference to our analysis." *Ibid.*

In the Ninth Circuit's view, "the function Apple serves rather than the manner in which it receives compensation for performing that function" was the "key" to deciding the case. Pet. App. 20a-21a. Since Apple "distributes" iPhone apps to the App Store's consumers, the panel reasoned, iPhone users are "direct purchasers of iPhone apps from Apple." *Ibid.* As "direct purchasers," the court held, the plaintiffs could bring a § 4 claim despite *Illinois Brick*. *Ibid.*

SUMMARY OF ARGUMENT

Forty-one years ago, in *Illinois Brick Co. v. Illinois*, this Court announced a bright-line rule barring indirect purchasers from suing to recover alleged overcharges passed on to them through a distribution chain. Ever since, only a direct purchaser may sue to recover federal antitrust damages—even if that purchaser passed the alleged overcharge to its customers.

Illinois Brick flowed logically from *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), which held that a defendant can't reduce

its exposure to antitrust damages under § 4 simply by showing that the plaintiff passed some of its overcharge damages to an indirect purchaser. Taken together, *Hanover Shoe* and *Illinois Brick* establish that "the overcharged direct purchaser, and not others in the chain of manufacture or distribution," is the "person * * * injured in his business or property" under § 4 of the Clayton Act. *Illinois Brick*, 431 U.S. at 729; 15 U.S.C. § 15(a).

That rule is dispositive here. As the Petitioner has shown, the plaintiffs' § 4 claim hinges on precisely the sort of "pass through" theory of harm that *Illinois Brick* prohibits. "In fact, it depends on conducting a prohibited pass-through analysis millions of times, because the required economic analysis must be undertaken app-by-app and Respondents have styled their claim as a class action covering all United States purchasers of all iPhone apps." Br. of Pet'r 18.

But the Ninth Circuit disagrees. In the face of this Court's decisions, the panel below held that anyone who buys a good or service may, under § 4, sue anyone who delivered it. In so holding, the appeals court adopted the outcome favored by Justice Brennan's dissent in *Illinois Brick*: "[I]t is irrelevant to whom damages are paid, so long as someone redresses the violation." 431 U.S. at 760 (Brennan, J., dissenting). As Judge Fletcher, who authored the panel's opinion, announced at oral argument, "I think Justice Brennan got it right in *Illinois Brick*." CA9 Oral Argument at 4:20, *Pepper v. Apple Inc.*, No. 14-15000 (Feb. 10, 2016).

Stare decisis demands more—especially here. As *Illinois Brick* emphasized, Congress is always free to legislate away this Court's interpretation of § 4 if it disagrees with it. Yet Congress has never done so. In the four decades since the Court decided *Illinois Brick*, no fewer than 17 bills have sought to repeal the direct-purchaser rule. None of those bills has garnered so much as a floor vote in either chamber of Congress. Such "congressional silence, after years of judicial interpretation, supports adherence to the traditional view." *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 594 (2004).

Nor is that all. While Congress has amended the Clayton Act many times during the same interval, it has never altered or repealed the "any person * * * injured in his business or property" language from which this Court's direct-purchaser rule derives. What's more, Congress has twice amended § 4 itself, in 1980 and 1982, at the height of a "repeal-*Illinois-Brick*" frenzy. And the last of those amendments—the Foreign Sovereign Antitrust Recoveries Act of 1982—expressly overturned another of this Court's decisions construing the very statutory language at issue in *Illinois Brick*.

Yet in both amendments, Congress fully retained the statutory basis for the direct-purchaser rule. Under this Court's case law, those amendments give *Illinois Brick* special precedential force. While legislative inaction by Congress doesn't always equal acquiescence, Congress's long history of inaction here, combined with its deliberate amendments to § 4 of the Clayton Act, show decisively that Congress has ratified the direct-purchaser rule.

While it is good to adhere to settled law, it is even better to adhere to settled law that works. Many companies have crafted their entire business model around selling apps through the App Store. These companies—and all other app developers—have skin in the game. They are highly motivated to sue if they think they are suffering from abusive app distribution. They are also highly motivated *not* to sue if they are profiting from efficient app distribution. Consumers do not share these incentives. How Apple distributes apps is of little consequence to their lives (and of *no* consequence to their livelihoods). *Illinois Brick*'s direct-purchaser rule properly concentrates the power to sue in the app developers rather than in the consumers.

In all events, the underlying Sherman Act claim here is blatantly meritless. Apple is not a monopolist; it has no power to exploit app developers. No, the App Store is the free market at its best: Apple, app developers, and consumers all engage in voluntary transactions, and everyone benefits. And the lack of a lawsuit from app developers confirms as much. The presence of this lawsuit, meanwhile, confirms merely that plaintiffs' lawyers and plaintiffs with no skin in the game will use any opening to bring a strike suit. Not only has the direct-purchaser rule proven efficient, as this case shows, but—especially given the innovative nature of the digital economy—it is more relevant now than ever before.

ARGUMENT

I. CONGRESS HAS RATIFIED THE DIRECT-PURCHASER RULE VIA FOUR DECADES OF LEGISLATIVE ACQUIESCENCE.

Stare decisis has "special force in the area of statutory construction" where "Congress remains free to alter" what this Court has done. *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989). Even in antitrust, where Congress has given the federal courts the power to develop common law defining "substantive violations," nothing "suggest[s] that Congress intended courts to have the power to alter or supplement the remedies enacted." *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 645 (1981).

In *Illinois Brick*, the Court explicitly invited Congress, "[s]hould [it] disagree with this result," to "amend the [Clayton Act] to change it." 431 U.S. at 735 n.14. Yet for more than 40 years, Congress has never done so. Instead, ever since *Illinois Brick*, Congress has steadfastly rejected a host of legislative proposals to repeal it. Given this "positive inaction," Congress has shown that it agrees with the Court's construction of § 4. *Cf. Flood v. Kuhn*, 407 U.S. 258, 283 (1972).

At the same time, because Congress is presumed to know of this Court's construction of statutory language, it "adopt[s] that interpretation when it re-enacts a statute without chang[ing it]." *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). Here, not only has Congress repeatedly amended the Clayton Act, but it has twice amended § 4 itself, retaining the

very language at issue in *Illinois Brick*. Those amendments give *Illinois Brick* extra precedential force. *See, e.g., Faragher v. City of Boca Raton*, 524 U.S. 775, 792 (1998) ("[T]he force of precedent here is enhanced by Congress's amendment to the [relevant statute] since [this Court's] decision, without providing any modification of our holding.").

A. Congress Has Steadfastly Refused to Alter or Repeal the Direct-Purchaser Rule.

Grounded in common-law principles favoring direct over indirect damages claims and shunning duplicative recoveries, the direct-purchaser rule reflects the Court's desire to avoid the inherently difficult task of apportioning antitrust damages. It also furthers the aim of antitrust deterrence. By concentrating the potential recovery—and thus the incentive to sue—solely in direct purchasers, the rule optimizes the deterrent effect of § 4's treble damages remedy. "[O]n balance, and until there are clear directions from Congress to the contrary," the direct-purchaser rule best furthers "the legislative purpose in creating a group of 'private attorneys general' to enforce the antitrust laws under § 4." *Illinois Brick*, 431 U.S. at 746.

In inviting Congress to enact a different rule if it disagreed, the Court doubtless was aware of the controversy *Illinois Brick*'s direct-purchaser rule would generate. In light of the strong opinions (for and against) that the rule has evoked ever since, Congress's refusal to repeal *Illinois Brick* can't be dismissed as mere inadvertence or indifference. Nor has there been a shortage of lobbying efforts to give

indirect purchasers standing to sue under § 4. On the contrary, *Illinois Brick* "generated a firestorm of criticism from the day it was decided." Edward D. Cavanaugh, Illinois Brick*: A Look Back and a Look Ahead*, 17 Loy. Consumer L. Rev. 1, 18 (2004).

Within days of the decision, a coalition of state attorneys-general circulated a bill, the "sole purpose" of which was "to overrule *Illinois Brick* directly and nothing else." *Coalition Prepares Possible Legislation to Overrule* Illinois Brick *in Congress*, Antitrust & Trade Reg. Rep. (BNA) No. 820, at A-16 (June 30, 1977). The American Bar Association quickly assembled a task force devoted to undoing *Illinois Brick*'s direct-purchaser rule. This "Task Force did not assess the desirability of a legislative reversal * * * but rather proceeded on the assumption that such legislation * * * would be passed." Josef D. Cooper & David L. Foster, *Report of the American Bar Ass'n Antitrust Law Section Task Force on Legislative Alternatives Concerning* Illinois Brick Co. v. Illinois, 46 Antitrust L.J. 1137, 1141 (1978).

Members of Congress, too, responded with a flurry of bills to abrogate *Illinois Brick*. *See* H.R. 11942, 95th Cong. (1978); H.R. 10783, 95th Cong. (1978); S. 1874, 95th Cong. (1977); H.R. 9132, 95th Cong. (1977); H.R. 8517, 95th Cong. (1977); H.R. 8516, 95th Cong. (1977); H.R. 8359, 95th Cong. (1977). "While the formulations of the different bills varied widely, the primary thrust of the proposals was to repeal the *Illinois Brick* holding by making it clear that indirect purchasers whose business or property is injured by reason of an antitrust violation shall be entitled to sue for treble damages under § 4 of the Clayton Act." Edward D.

Cavanaugh, *The* Illinois Brick *Dilemma: Is There a Legislative Solution?*, 48 Alb. L. Rev. 273, 274 n.10 (1984).

Though Congress held "extensive hearings" on each of these bills in both the House and Senate, none made it out of committee in either chamber; all eventually died. *Id.* at 274-75. Similar efforts to repeal *Illinois Brick* failed in the 96th Congress,[2] in the 97th Congress,[3] in the 98th Congress,[4] and so on.[5] But despite a ten-year crusade for legislative repeal, opponents of *Illinois Brick* simply couldn't persuade Congress that this Court's direct-purchaser rule was, on balance, bad antitrust policy.

After these persistent but unsuccessful lobbying efforts, the controversy over the direct-purchaser rule lay mostly dormant until 1990, when this Court reaffirmed the rule. *Kansas v. Utilicorp United, Inc.* asked the Court to decide who may sue "when, in violation of the antitrust laws, suppliers overcharge a public utility for natural gas and the utility passes on the overcharge to its customers." 497 U.S. at 204. In refusing to carve out a pass-through exception for states suing as *parens patriae*, the Court explained: "Having stated the rule in

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[2] *See* S. 300, 96th Cong. (1979); H.R. 2204 96th Cong. (1979); H.R. 2060, 96th Cong. (1979).

[3] *See* S. 2772, 97th Cong. (1982).

[4] *See* S. 915, 98th Cong. (1983); H.R. 2244, 98th Cong. (1983).

[5] *See* S. 1962, 100th Cong. (1987); S. 2481, 99th Cong. (1986); S. 2022, 99th Cong. (1986).

Hanover Shoe, and adhered to it in *Illinois Brick*, we stand by our interpretation of § 4." *Id.* at 217.

Despite *Utilicorp*, it wouldn't be until 2000 that another *Illinois Brick* "repealer" bill appeared in Congress. *See* H.R. 4321, 106th Cong. (2000). Like its predecessors, the proposed Antitrust Enforcement Improvement Act sought to amend § 4 of the Clayton Act to allow any "indirect purchaser in the chain of manufacture, production, or distribution of goods or services" to sue for damages. *Ibid.* And like its predecessors, the bill went nowhere. After being referred for hearings to the House's Judiciary and Agriculture Committees, it died for lack of support. *Ibid.*

In 2002, Congress created the Antitrust Modernization Commission "to examine whether the need exists to modernize the antitrust laws and to identify and study related issues." Antitrust Modernization Commission Act of 2002, Pub. L. No. 107-273, 116 Stat. 1856, 1856 (2002). While Congress had authorized similar commissions in the past, this was the first one to be convened after *Hanover Shoe* and *Illinois Brick*. The Commission submitted its final report and recommendations to Congress in 2007. *See* Antitrust Modernization Commission, Report and Recommendations (2007), https://govinfo.library.unt.edu.amc/report_recommendation/amc_final_report.pdf.

The final report noted that "[v]igorous debate over whether to allow only direct, or both direct and indirect, purchasers to seek antitrust damages has continued for almost thirty years." *Id.* at 266. The Commissioners divided over "whether the deterrence

of antitrust violations is best achieved by limiting recoveries to direct purchasers or permitting indirect purchasers to sue as well." *Id.* at 273. But in the end, the Commission urged Congress to "[o]verrule *Illinois Brick* and *Hanover Shoe* to the extent necessary to allow both direct and indirect purchasers to sue to recover for actual damages from violations of federal antitrust law." *Id.* at 267.

As antitrust scholar William Page presciently noted at the time, "Congress has shown no signs that it will adopt these recommendations." William H. Page, *Class Interpleader: The Antitrust Modernization Commission's Recommendation to Overrule* Illinois Brick, 53 The Antitrust Bull. 725, 726 (2008). Nor *should* Congress adopt the Commission's proposal, Page argued, "for two primary reasons." *Id.* at 744. First, "a pure direct purchaser regime would produce the most efficient means of imposing a deterrent penalty equal to three times the overcharge." *Ibid.* And second, "even if compensation is an appropriate goal, indirect purchaser suits will not achieve it." *Ibid.*

Eleven years later, it hardly needs saying that the Commission's recommendation to repeal the direct-purchaser rule was a legislative non-starter; it failed even to produce a single bill. That is, Congress created and funded a special commission to suggest improvements in federal antitrust law. Then, after five years of study and deliberation, that commission urged (among other things) amending the Clayton Act to give indirect purchasers § 4 standing to sue. But Congress has flatly refused to do so. "If there is any inconsistency or illogic in all this, it is an inconsistency and illogic of long standing that is to

be remedied by the Congress, and not this Court." *Flood*, 407 U.S. at 284.

* * *

From almost the day *Illinois Brick* was decided, Congress has been urged repeatedly to amend § 4 to permit indirect purchasers to seek antitrust damages. But nothing has come of any of those efforts. This steadfast refusal to repeal the direct-purchaser rule, in the face of dogged and persistent efforts to do so, is unusually strong evidence of congressional intent. In other words, "the matter has been fully brought to the attention of the public and the Congress," and "the latter has not seen fit to change the statute." *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 488-89 (1940).

B. Since *Illinois Brick*, Congress Has Twice Amended § 4 of the Clayton Act, Without Giving Indirect Purchasers Standing to Sue.

Congress has not been shy about amending the Clayton Act; it has done so more than two dozen times over the past four decades. More telling still, Congress has amended § 4 itself, twice, since *Illinois Brick*. And the last time it did so, it expressly overruled another of this Court's constructions of § 4. Yet Congress has never changed—much less repealed—*Illinois Brick*'s direct-purchaser rule. By amending § 4 while refusing to give indirect purchasers standing to seek treble damages, Congress has gone "well beyond" the mere failure "to act on legislative proposals." *Bob Jones Univ. v. United States*, 461 U.S. 574, 601 (1983).

Since Congress knows how to abrogate this Court's statutory constructions if it wants to, when "a word or phrase has been authoritatively interpreted by the highest court in a jurisdiction," then a "later version of [the same law] perpetuating the wording is presumed to carry forward that interpretation." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 322 (2012); *see Forest Grove School Dist. v. T.A.*, 557 U.S. 230, 244 n.11 (2009) ("When Congress amended [the Act] without altering the text of [the relevant provision], it implicitly adopted [this Court's] construction of the statute."). That canon controls here.

In 1980, Congress enacted the Antitrust Procedural Improvements Act. *See* Pub. L. 96-349, 94 Stat. 1156 (1980). Among other things, the new law amended § 4(a) of the Clayton Act to provide for the recovery of prejudgment interest. *Ibid.* At the same time, it left intact the "any person * * * injured in his business or property" language construed only three years earlier in *Illinois Brick*. And despite the well-documented debate underway at the time, nothing in the 1980 amendment addressed direct or indirect purchasers; nor did it alter, in any way, standing to sue under § 4. *Ibid.*

Two years later, Congress enacted another amendment to § 4—this time, in direct response to one of this Court's decisions. In *Pfizer, Inc. v. Government of India*, 434 U.S. 308, 313-14 (1978), the Court decided that "Congress did not intend to make the treble-damages remedy available only to consumers in our own country." Construing the very statutory language at issue in *Illinois Brick*, *Pfizer*

held that foreign governments are "persons" who may sue under § 4 to recover treble damages for injuries caused by antitrust violations. *Ibid.*

But Congress disagreed. After all, § 4a of the Clayton Act expressly limits the federal government's antitrust recovery to "actual damages." *See* 15 U.S.C. § 15a. And yet *Pfizer* gave foreign governments a more potent remedy than the United States enjoys for punishing violations of its own antitrust laws. That jarring disparity prompted a vigorous debate in both houses of Congress. *See* H.R. Rep. No. 97-476 (1982); S. Rep. No. 97-78 (1981).

So in 1982, Congress again amended § 4 of the Clayton Act. *See* Pub. L. 97-393, 96 Stat. 1964 (1982). The Foreign Sovereign Antitrust Recoveries Act of 1982, also known as the "Pfizer Act," explicitly abrogated *Pfizer*'s holding by limiting a foreign state's recovery to actual, rather than treble, damages. *Ibid.* Yet again, Congress preserved the "any person" wording that provided the statutory basis for *Illinois Brick*'s direct-purchaser rule. *Ibid.* And yet again, Congress opted not to grant indirect purchasers standing to sue under § 4. *Ibid.* Nor has it ever done so.

Of course, when it twice amended § 4 in the aftermath of *Illinois Brick*, Congress was well aware of this Court's direct-purchaser rule. Indeed, a debate was still raging over whether Congress intended § 4 to limit standing only to direct purchasers. That multi-year debate "brought forth sharply conflicting views, both on the Court and in Congress." *Apex Hosiery*, 310 U.S. at 488. And amid that debate, Congress "made a considered judgment

to retain the relevant statutory text." *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Proj., Inc.*, 135 S. Ct. 2507, 2519 (2015). The historical record is clear: Congress has ratified the rule of *Hanover Shoe* and *Illinois Brick*.

* * *

While it is true that "any departure" from *stare decisis* "demands special justification," *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984), *stare decisis* has special force here. For more than 40 years, Congress has made a clear (though, of course, not irrevocable) decision to embrace *Hanover Shoe* and *Illinois Brick*. In all that time, Congress has never concluded that any proposed change would yield, on balance, a better result for antitrust enforcement than this Court's direct-purchaser rule.

Along with Congress's repeated refusal to adopt proposed repeals of *Illinois Brick*, its § 4 amendments manifest "an unusually strong case of legislative acquiescence in and ratification by implication of" the direct-purchaser rule. *Bob Jones Univ.*, 461 U.S. at 599.

II. THE MERITLESSNESS OF THIS LAWSUIT—AND THE ABSENCE OF A LAWSUIT BY APP DEVELOPERS—CONFIRMS THE WISDOM OF *ILLINOIS BRICK*.

The merits of this lawsuit are not before the Court. Still, this lawsuit's utter lack of merit is relevant to the question presented. *Illinois Brick* posits that the direct purchaser is best situated to sue an abusive monopolist. Since they transact with

the violator, direct purchasers are better positioned than indirect purchasers to detect the violator's anticompetitive practices. *See* William M. Landes & Richard A. Posner, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of* Illinois Brick, 46 U. Chi. L. Rev. 602, 609 (1979).

What's more, direct purchasers (normally suppliers or distributors) are usually less numerous and more concentrated than indirect purchasers (normally retail consumers). So direct purchasers' antitrust lawsuits will less often be diffuse class actions with high administrative costs and little recovery for the class itself. *Id.* at 607.

Above all, direct purchasers have the most incentive to sue only for conduct that is in fact anticompetitive. That is because a supplier or distributor is the monopolist's bulk purchaser. If the monopolist's conduct is efficient, the supplier or distributor stands to lose a great deal by trying to kill that efficiency through an antitrust lawsuit. In contrast, a consumer stands to lose little or—if the product is something she will buy only once—nothing by filing a baseless suit.

Contrary to the plaintiffs' claim, the anticompetitive practice they allege would harm app developers most. A monopoly rent is by definition a supracompetitive charge that lowers demand for a product. If Apple's 30% commission were in fact supracompetitive, the arrangement between app developers and Apple would be such that (1) Apple ensures that apps sell at a monopoly price, (2) Apple collects the entirety of the resulting monopoly rent,

and (3) the monopoly price results in fewer apps sold by app developers. If this were true, the app developers would be getting a raw deal, *so they would sue.*

But that hasn't happened, and it isn't hard to see why. Apple is in no position to abuse app developers because Apple is not a monopolist. It controls only about a third of the American smartphone market. *See* Dominic Sunnebo, *Samsung Back to #1 in US, but Share is Down*, Kantar World Panel (Sept. 8, 2017), at https://perma.cc/4MUZ-C5NJ. Its market share would have to double for the iPhone even to approach qualifying as a monopoly product. *See* United States Department of Justice, *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act: Chapter 2: Monopoly Power* (June 25, 2015), at https://perma.cc/6SFU-B9KG.

True, the plaintiffs claim that Apple wrongly monopolized not the market in smartphones, but the distribution for a market in iPhone apps. Yet unless Apple obtains monopoly power in the smartphone market, its decision to sell third-party apps only on a 30% commission and only through an App Store is no different from a corner grocer's decision to sell condiments only on a 30% commission and only on a certain shelf. A non-monopolist simply can't hurt competition in this way. At most, it can drive customers only to its competitors.

This lack of monopoly power incentivizes Apple to support robust app development. iPhones and iPhone apps are complementary goods. If apps become better, cheaper, and more plentiful, demand

for the iPhone increases. As MIT professors Andrew McAfee and Erik Brynjolfsson explain:

> The 'killer app' varies across potential iPhone customers. Some want games, some want business tools, some want to stream music while others want to make music, some want to use social media, some want to use their phones as small scientific instruments, and so on. The best way to discover these preferences, let alone to satisfy them, is to turn the App Store into something closer to an open marketplace than a store with a single owner.

Andrew McAfee & Erik Brynjolfsson, *Machine, Platform, Crowd: Harnessing Our Digital Future* 157 (2017). The more Apple encourages developers to create apps, the more apps will become available. The more apps available, the more iPhones Apple will sell. A proliferation of apps, McAfee and Brynjolfsson explain, "is exactly what Apple wants." *Id.* at 161.

In our extraordinarily innovative technology sector, fleeting monopolies on new inventions drive ever-increasing quality at ever-lower prices. *See* Richard A. Posner, *Antitrust Law* 249-50 (2d ed. 2001). Apple invented a massively beneficial new product. Rivals quickly piled into the market. Smartphone prices dropped and smartphone apps proliferated. As between app developers and app purchasers, the app developers benefit most if this process is efficient. And they stand to suffer most if it is exploitative. Their decision whether to sue

under the antitrust laws is consequential; it is a strong revealed preference. Their collective decision not to sue confirms that the distribution market for iPhone apps is efficient.

In sum, a handful of consumers have brought a meritless antitrust lawsuit against Apple. But *no* app developers have brought an antitrust lawsuit against Apple. The upshot is that the direct-purchaser rule works just as efficiently today as when this Court first articulated it four decades ago. That is, it opens the path for those with the most incentive to fulfill the purpose of the antitrust laws. And it shuts the door on those with the most incentive to use the antitrust laws to seek rents.

CONCLUSION

The Court should reverse the judgment below.

Respectfully submitted,

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